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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

UNITED STATES OF AMERICA, APPELLANT

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*) is not yet reported.

JURISDICTION

The order of the district court was entered on July 15, 1971. A notice of appeal was filed by the United States in that court on September 13, 1971 (App. B, *infra*). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29.

QUESTION PRESENTED

Whether Section 3 of the Sherman Act applies to American Samoa.

STATUTE INVOLVED

Section 3 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 3, provides:

> Every contract, combination * * * or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is [hereby] declared illegal. * * *

STATEMENT

On September 30, 1969, the United States filed a civil complaint against the Standard Oil Company of California ("SOCal") to enjoin violations of Section 3 of the Sherman Act (15 U.S.C. 3). That Section prohibits, *inter alia*, restraints of trade in "any Territory of the United States" or between "any such Territory" and the United States. The complaint alleges that SOCal combined and conspired to restrain and monopolize the distribution and sale of petroleum products in American Samoa.[1] After extensive pre-trial discovery, SOCal

[1] According to the complaint, SOCal is the only distributor of petroleum products in American Samoa, where it sells diesel fuel, aviation gasoline and jet fuel, and gasoline and oil products for automobiles. SOCal's petroleum products are used by the government of American Samoa, the United States Armed Forces and by the tuna fishing fleets which operate from American Samoa (Complaint, para. 4). In 1966, SOCal imported into American Samoa more than 20 million gallons of petroleum products with a value of more than $3.5 million (Complaint, para. 6).

moved to dismiss the suit for lack of jurisdiction on the ground that American Samoa [2] was not a "Territory" within the meaning of Section 3.

The district court granted the motion (App. A, *infra,* 11–21), citing this Court's statement in *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 259 that "the word 'territory' was used [in Section 3] in its most comprehensive sense, as embracing all *organized* territories, whether incorporated into the United States or not, including Puerto Rico" (emphasis added). As American Samoa is not an organized territory, the court concluded that it was beyond the reach of Section 3.

The district court also noted that the Clayton Act (38 Stat. 730, as amended, 15 U.S.C. 12 *et seq.*) de-

---

The complaint charges that, in order to exclude potential competitors who were considering entering the Samoan market, SOCal conspired with the tuna packers by entering into long-term requirements contracts for the purchase of diesel fuel and reduced the prices of its petroleum products (Complaint, para. 8).

[2] American Samoa consists of seven small islands in the South Pacific with a population of approximately 30,000 persons who are mostly native Polynesian (U.S. Bureau of the Census, *Statistical Abstract of the United States: 1970*, p. 794). By treaty in 1899, Great Britain and Germany recognized the United States' claims to American Samoa and in 1929 Congress vested all powers for its government in the President and his designees (Act of February 20, 1929, 45 Stat. 1253, as amended, 48 U.S.C. 1661). Governing power was first delegated to the Secretary of the Navy, but in 1951 the President transferred administration of American Samoa to the Secretary of the Interior (Executive Order 10264, 16 F.R. 6417–6419). See, *Study Mission to Eastern [American] Samoa*, Report of Senators Oren E. Long, of Hawaii, and Ernest Gruening of Alaska to the Committee on Interior and Insular Affairs, United States Senate, 87th Cong., 1st Sess., S. Doc. No. 38.

fines "commerce" to include trade or commerce "within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States * * *" (15 U.S.C. 12), and quoted the House Report accompanying the bill that became the Clayton Act (H. Rep. 627, 63d Cong., 2d Sess., pp. 7–8), which stated that the broadened definition of commerce in the bill was intended to include insular possessions or other places under the jurisdiction of the United States, to which, in the committee's view, the Sherman Act did not apply (App. A, *infra*, 17–19).

THE QUESTION IS SUBSTANTIAL

The district court misconstrued this Court's decision in *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, and incorrectly concluded that American Samoa is not a "Territory" within the meaning of Section 3 of the Sherman Act. If that decision stands, American Samoa will be denied all protections that Congress provided in the Sherman Act against restrictive trade practices, including the serious restraints with which SOCal is charged. While as a practical matter, the issue is of little significance outside of American Samoa, and perhaps the Canal Zone, the government's sole judicial recourse under the Expediting Act is a direct appeal to this Court. It is important to Samoa and to those charged with administering the law to know whether the Sherman Act does or does not apply to American Samoa.

1. In *Puerto Rico* v. *Shell Co., supra,* this Court was faced with the question whether Section 3 of the Sherman Act applied to Puerto Rico, a territory for which Congress had established a civil government by

virtue of an Organic Act, *i.e.*, an "organized territory." Noting that when the Sherman Act was passed the United States had no insular dependencies, the Court found the question before it to be whether "if the acquisition of * * * [Puerto Rico] had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act." 302 U.S. at 257. Referring to its earlier decision in *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 435, where it had ruled that in enacting Section 3 of the Sherman Act Congress had intended to exercise all the power it possessed, the Court concluded that "Congress intended to include all territories to which its powers might extend."[8] 302 U.S. at 259. In this context, the Court's holding that the word "territory" in Section 3 embraced "all organized territories," (*ibid.*) must be regarded merely as a description of the type of territory involved in that case and not as a determination that Congress would have, had it considered the matter, drawn a line between organized and unorganized territories, applying Section 3 only to the former. There was no issue in *Shell* whether Section 3 applies to unorga-

[8] There is no question that Congress' legislative powers extend under Article IV, Section 3, clause 2 of the Constitution to all United States possessions, whether organized or not. "Possessions such as Puerto Rico, Guam, the guano islands, *Samoa* and the Virgin Islands * * * are ceded territory over which United States sovereignty is as complete and as unquestioned as over the District of Columbia * * *. *They are incorporated into our economy, freely trading in our markets, and 'protected' by our tariff walls* * * *" (*Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 397, Mr. Justice Jackson, dissenting (emphasis added)).

nized territories, and the Court had no occasion to consider, let alone decide, that question.

This same analytical approach was followed in *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, which presented the question whether the Fair Labor Standards Act (52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*), which applied to any "possession" of the United States, applied to a leased military base on Bermuda. This Court held that it did. At the time the Act was passed, the United States had bases similar to the one on Bermuda, but no mention of these bases was made in the Act or in its legislative history, and some later statutes specifically described leased areas in terms different from "possession." But the Court found neither of these factors persuasive. Ruling that "[t]he word possession is not a word of art, descriptive of a recognized geographical or governmental entity" (335 U.S. at 386), the Court held that its "duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind" (335 U.S. at 386–388).

The district court failed in this case to apply the teaching of *Shell* and *Vermilya-Brown* and made no attempt to determine whether Congress, if it had foreseen the acquisition of American Samoa, would have excluded it from the comprehensive coverage of Section 3 of the Sherman Act. Nor did the court point to any reason why Section 3 should apply to

organized territories but not unorganized territories.[4] The enactment of an Organic Act for a particular possession has little, if any, relevance to the question whether the Sherman Act should apply to prevent and punish unreasonable restraints of trade within its borders, or between it and other states, territories or foreign nations. In the present case, for example, the local government in American Samoa is responsible to the Secretary of the Interior, whose authority was delegated by the President acting pursuant to 48 U.S.C. 1661(c). There is nothing in that statute or in the Secretary's administration of the islands to indicate an intention to except American Samoa's economic development from the principles of free competition which underly the Sherman Act, and are applicable to the economies of the United States and its other possessions.

[4] Appellee devoted a considerable portion of its brief in the district court to an attempt to show that application of the Sherman Act to American Samoa would destroy its "way of life." Its argument, most of which was based on the communal nature of Samoan land ownership, and the restrictions against alienation of the land to non-Samoans, is plainly untenable. Thus, SOCal suggested that application of the Sherman Act would result in unwanted economic exploitation of American Samoa. But the economic development of American Samoa has been and will continue to be guided and controlled by our government and theirs. The application of traditional principles of free enterprise to such development as the respective governments deem appropriate will be consistent with the interests of the Samoans. Congress in 1914 did not see any incompatibility between local customs and application of the Clayton Act to American Samoa. Finally, SOCal's claimed concern for the Samoans has a somewhat hollow ring, coming as it does in a case in which it is alleged to have exploited the economic interests of American Samoa and its people.

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A holding that Section 3 of the Sherman Act applies to American Samoa would not mean that other statutes also applicable to "territories" necessarily apply there. *Shell and Vermilya-Brown* show that the meaning of a word defining the coverage of a statute depends upon what reach Congress intended the particular statute to have, not upon how the word has been interpreted in other statutes. In *Shell,* the Court pointed out (302 U.S. at 258) that "whether Puerto Rico comes within a given congressional act applicable in terms to a 'territory,' depends upon the character and aim of the act," and the fact that Puerto Rico "may not be a 'territory' within the meaning of the word as used in some statutes" was not dispositive of whether it is a territory for purposes of the Sherman Act.

2. The district court's reliance on the language of the Clayton Act and its legislative history is misplaced. The House report that accompanied the bill that became the Clayton Act explained that the scope of the act was broadened to include within its reach insular possessions and other places

> which at present do not come within the scope of the Sherman antitrust law. * * * *Your committee can conceive of no good reason why the insular possessions or other places now under the jurisdiction of the United States should not be included within the provisions of our antitrust laws,* and with this idea in view we have accordingly in this bill broadened the scope of these laws so as to make them applicable to all places under the jurisdiction of the United States. [H. Rep. No. 627, 63d Cong., 2d Sess., pp. 7–8 (emphasis supplied).]

The committee's view that the Sherman Act—enacted a quarter of a century earlier—did not apply to certain possessions, is of little help in disposing of this case since "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price,* 361 U.S. 304, 313; *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348–349. What is of significance, however, is that the committee report, and the Clayton Act itself, make clear that Congress in 1914 perceived no reason why the antitrust laws should not extend to all United States possessions regardless of their status. Under the reasoning of *Shell,* therefore, the Sherman Act does apply to American Samoa.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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OCTOBER 1971.

APPENDIX A

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

No. 52334—Civil

UNITED STATES OF AMERICA, PLAINTIFF

v.

STANDARD OIL COMPANY OF CALIFORNIA, DEFENDANT

OPINION AND ORDER

This is a civil action brought by the Government charging the defendant, Standard Oil Company of California, with violations of Section 3 of the Sherman Act (15 U.S.C. § 3). The complaint alleges that the defendant has violated said Act by combining to unreasonably restrain and monopolize the distribution and sale of petroleum products in the Territory of American Samoa, and by entering into contracts in unreasonable restraint of that trade. Defendant has moved to dismiss the action for lack of jurisdiction.

Section 3 of the Sherman Act provides in pertinent part:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State

> or States or foreign nations, is hereby declared illegal.

It is apparent that American Samoa is not the "District of Columbia", nor a "State", nor a "foreign nation". Therefore, if the Sherman Act is to extend to Samoa, then such possession must fall within the category of "Territories".

At the time of the Sherman Act (1890), the United States had no insular possessions and Congress could not, therefore, have had Samoa in mind. But this is not determinative so long as the word "territory" as used in the Sherman Act can properly be applied to American Samoa. The issue here is basically the same as was presented in *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937), wherein the Court stated:

> The only question, therefore, is whether the word "territory", as used in § 3 of the Sherman Act, properly can be applied to a dependency now bearing the relation to the United States which is borne by Puerto Rico (American Samoa).

The defendant contends that the word "territory", as used in the Sherman Act and many other statutes passed by Congress, applies only to organized territories, that American Samoa is not organized, and that therefore the Sherman Act does not apply to activities in Samoa.

The Government, on the other hand, contends that the word "Territory" in the Sherman Act was used in its most comprehensive sense as including all possessions of the United States, whether organized or not.

Since both parties rely heavily on the *Shell* case, supra, it seems appropriate to begin with an analysis of that decision. The main issue in that case was whether Puerto Rico could be considered a "Territory" within the meaning of Section 3 of the Sher-

man Act. Prior to holding that Puerto Rico was such a "Territory" the court discussed its earlier decision of *Kopel* v. *Bingham,* 211 U.S. 468 (1909).

In *Bingham,* the Court was called upon to determine if Puerto Rico was a "territory" within the meaning of § 5278 of the Revised Statutes, which provided for the demand and surrender of criminal fugitives by governors of territories and of states. The Court defined "territory", as used in § 5278, to mean "a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress with a separate legislature under a territorial governor and other officers appointed by the President and Senate of the United States." In conclusion, the court in *Bingham* further stated that "it may be justly asserted that Puerto Rico is a completely organized territory, although not a territory incorporated into the United States, and that there is no reason why Puerto Rico should not be held to be such a territory as is comprised in § 5278."

Immediately following this discussion of *Bingham,* the Court in *Shell* concluded:

> *With equal force,* it may be said here that there is no reason why Puerto Rico should not be held to be a "territory" within the meaning of § 3 of the Sherman Act. We pointed out in the Atlantic Cleaners & Dyers case . . . that in the light of applicable history and circumstances, it was apparent that Congress meant to deal comprehensively with the subject of contracts, combinations, and conspiracies in restraint of trade, 'and to that end to exercise all the power it possessed'; that while Congress in passing § 1 exercised only the power conferred by the commerce clause, in passing § 3 it exercised a general power, unlimited by that clause. We therefore concluded that the word 'trade'

as used in § 3 should be given a more extended meaning than the same word as used in § 1.

If, as we there determined, Congress *intended by the Sherman Act to exert all the power it possessed in respect of the subject matter,*—trade and commerce,—it is equally reasonable to conclude that *Congress intended to include all territories to which its powers might extend.* The same reason which requires the utmost liberality of construction in respect of the word 'trade', also requires the same degree of liberality of construction in respect of the word 'territory'; and we hold, accordingly, that the word 'territory' was *used in its most comprehensive sense,* as *embracing all organized territories,* whether incorporated into the United States or not, including Puerto Rico. (Emphasis added).

The United States cites the *Shell* case for the proposition that Congress, in passing Section 3 of the Sherman Act, exercised all the power it possessed under Article IV, Section 3, Clause 2, of the Constitution of the United States. It is submitted that in so doing Congress intended Section 3 to apply to all possessions of the United States, whether organized or not.

Standard Oil, on the other hand, points to the specific language in the holding of *Shell* which states that the word "territory" embraces "all *organized* territories, whether incorporated into the United States or not . . ." (Emphasis added.)

Although the *Shell* case is not entirely clear, this court is of the opinion that the Supreme Court interpreted the word "territories" as used in Section 3 to mean only organized territories.

Although the court did say that Congress intended to include within the reach of Section 3 "all territories to which its powers might extend", said statement can only be viewed in the context of the previ-

ous discussion of *Bingham,* supra, and the subsequent language that the word "territory" embraces "all organized territories . . . ." This court is particularly influenced by the fact that the Supreme Court's holding springs directly from its discussion of *Bingham.* In that case there can be no doubt that "territory", for the purposes of the statute in question, was held to mean an organized territory.

From a perusal of other relevant cases and statutes, it is apparent that Congress has over the years made the distinction between "territories" and other possessions, and that the distinguishing feature is that "terrritories" are organized pursuant to an Organic Act of Congress. Of particular interest is the case of *In Re Lane,* 135 U.S. 443 (1890), which was decided just a few months before the passage of the Sherman Act.

In *In Re Lane,* the defendant was indicted under a carnal knowledge statute and was alleged to have committed the crime "within that part of the Indian Territory commonly known as 'Oklahoma' ". The statute was applicable to all areas under the jurisdiction of the United States "except the territories". The issue presented was whether the defendant could come within the exception to the law by claiming that the offense was committed within the territory of Oklahoma. In holding that Oklahoma was not a "territory" within the meaning of the exception, the Supreme Court stated:

> . . . we think that the words 'except the territories' have reference exclusively to that system of organized government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative, and a judicial system. They have the powers which all these departments of

> government have exercised, which are conferred upon them by act of congress; and their legislative acts are subject to the disapproval of the congress of the United States. They are not in any sense independent governments. They have no senators in congress, and no representatives in the lower house of that body except what are called "delegates" with limited functions. Yet they exercise nearly all the powers of government under what are generally called "organic acts," passed by Congress, conferring such powers on them. It is this class of governments, long known by the name of "territories," that the act of congress excepts from the operation of this statute. . . .

The definition of "territory" set out in the *Lane* case was earlier stated in *Ex Parte Morgan,* 20 F. 298 (W.D. Ark. 1883). In discussing the meaning of "territory" as used in an extradition statute, the court stated:

> A territory, under the constitution and laws of the United States, is an inchoate state—a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States.

The foregoing cases point out examples of statutes in which Congress has made the distinction between "territories" and other possessions of the United States. Further examples of statutes wherein the same distinction has been made are as follows:

> *Polygamy Statute:*
>
> No polygamist, bigamist, or any person cohabiting with more than one woman . . . *in any Territory or other place* over which the United States has exclusive jurisdiction, shall be en-

titled to vote at any election held in any such Territory, or other place, or be . . . entitled to hold any office, . . . in, under, or for any such Territory or place, or under the United States. (Act of March 22, 1882; 22 Stat. 31; 48 U.S.C. Sec. 1461.)

Panama Canal Act:

. . . all laws relating to the rendition of fugitives from justices as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes, and *for such purposes only, the Canal Zone shall be considered and treated as an organized Territory* of the United States. (Act of August 24, 1912, Sec. 12; 37 Stat. 569.)

Shipping Act of 1916:

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas . . . from port to port between one State, *Territory,* District or *possession* of the United States and any other State, Territory, District or possession . . . or between places in the same Territory, District or possession (Act of September 7, 1916, Sec. 1; 39 Stat. 728; 46 U.S.C. Sec. 801).

It appears to this court that in light of various statutes enacted both before and after the Sherman Act, which have distinguished between "Territories" and other possessions of the United States, and a number of cases which have interpreted "territory" to mean organized territory, that had Congress intended the Sherman Act to apply to unorganized territories, it would have so stated.

The Government contends, however, that it is clear that the Clayton Act (enacted in 1914) is applicable to all possessions of the United States and to hold that the Sherman Act only applies to organized terri-

tories would create an "intolerable situation for Federal antitrust enforcement". In pertinent part the Clayton Act provides:

> "Commerce", as used herein, means trade or commerce among the several States . . . or between the District of Columbia or any Territory of the United States and any State . . . or between any insular possession or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States . . . (15 U.S.C. Sec. 12).

The fact that the Clayton Act extends to areas which may not be covered by the Sherman Act cannot be of major concern to this court. If Congress feels that this situation creates intolerable problems in the enforcement of antitrust laws, it can amend the Sherman Act to extend to all possessions of the United States. The issue before this court is the intent of Congress at the time of the passage of Section 3 of the Sherman Act, not the effect of that act when coupled with subsequent supplemental legislation.

Further, it appears that Congress, in passing the Clayton Act, intentionally expanded the scope of said Act to include unorganized possessions which were thought not to be covered by the Sherman Act. The following appeared in the House Committee Report submitted by Mr. Clayton:

> Section 1 of the bill (Clayton Act) defines technically for the purposes of this bill certain words, phrases and terms used in the body of the bill . . . The definition of commerce, it will be observed, is broadened so as to include trade and commerce between any insular possessions or other places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman antitrust law. . . . The act approved July 2, 1890, and

> commonly referred to as the Sherman law, and supplementary legislation pertaining to the same subject, are restricted in application to commerce among the several states and Territories, the District of Columbia, and with foreign nations. Your committee can conceive of no good reason why the insular possessions or other places now under the jurisdiction of the United States should not be included within the provisions of our antitrust laws, and with this idea in view we have accordingly in this bill broadened the scope of these laws so as to make them applicable to all places under the jurisdiction of the United States. (H. Rept. 627, 63rd Cong., 2d Sess. (1914), pp. 7–8

In accordance with the authorities cited above, it is the finding of this court that Section 3 of the Sherman Act is not applicable to those possessions of the United States which are unorganized. There remains then only the question of whether American Samoa is an organized territory.

It is clear that American Samoa is an unorganized possession. Congress has never established a civil government for American Samoa by the passage of an Organic Act, but rather has left its administration with the executive branch of the Government in the person of the Secretary of the Interior. Further, as is pointed out in detail in defendant's brief in support of its motion to dismiss, Congress has on many occasions considered the propriety of giving Samoa an Organic Act, and on each occasion has decided that it would be in the best interest of Samoa to leave it unorganized.

In conclusion, this court is in agreement with the reasoning of the National Labor Relations Board in *Star-Kist Samoa Inc.*, 68 L.R.R.M. 1532 (N.L.R.B. 1968). The issue before the court was whether the Labor-Management Relations Act extended to Ameri-

can Samoa. The applicability of such Act is almost identical to that of the Sherman Act and extends to:

> . . . trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory . . . or within . . . any Territory . . . 49 Stat. 450, 29 U.S.C. Sec. 152(c).

In holding that American Samoa was not a "Territory" within the meaning of the Act, the court stated:

> The Board has previously interpreted "Territory", as used in Section 2(6) to include, interalia, Puerto Rico, the Virgin Islands, and Guam.
>
> In *Ronrico*, supra, the Board concluded that it had jurisdiction in Puerto Rico, finding that the courts had invariably interpreted "Territory" (in a like statutory context) as meaning only those possessions endowed with certain characteristics. If "incorporated" and "organized" it is a "Territory". "Incorporated" means that the territory has been declared by statute or treaty to be a part of the United States. "Organized" refers to Congressional establishment of a system of local self government. If the possession is organized but not incorporated it may still be a "Territory". The determinative factor in such cases is the intent of Congress in enacting the statute. . . . . American Samoa is neither "incorporated" nor "organized". It does not have even a rudimentary government established by Congress, but rather one established by the executive branch in the person of the Secretary of the Interior, to whom administrative authority was delegated by the President. It is not specifically included as a territory in Section 14(c)(2). Further distinguishing American Samoa from those dependencies of the United States which have been found to be "Territories" is the fact that

its inhabitants, while American Nationals, are not citizens, that it is not within the jurisdiction of any Circuit Court, and that it has no Federal District Court.

Under all of the relevant circumstances, particularly the fact that Congress has not established any form of self government for American Samoa, and in the absence of a clear Congressional mandate, we conclude that American Samoa does not come within the jurisdiction of the Act.

It is, therefore, the order of this court that defendant's motion to dismiss the action for lack of jurisdiction be, and it hereby is, granted.

Dated: July 15, 1971.

SAMUEL CONTI,
United States District Judge.

APPENDIX B

United States District Court for the Northern District of California

Civil No. 52334–SC

UNITED STATES OF AMERICA, PLAINTIFF

v.

STANDARD OIL COMPANY OF CALIFORNIA, DEFENDANT

Notice of Appeal to the Supreme Court of the United States by the United States of America

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States under the Expediting Act, 15 U.S.C. § 29, from the order entered July 15, 1971 dismissing the action for lack of jurisdiction.

Dated: September 13, 1971

(S) Bernard M. Hollander
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA,
Appellant

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-527

UNITED STATES OF AMERICA,
Appellant

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Standard Oil Company of California moves that the judgment of the District Court be affirmed.

STATUTES INVOLVED

Section 3 of the Sherman Act applies to a contract, combination, or conspiracy in restraint of trade or commerce:

> "* * * in any Territory of the United States or of the District of Columbia, or * * * between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations * * *" (15 U.S.C. § 3).

Section 4 of the Sherman Act provides:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title * * *" (15 U.S.C. § 4).[1]

QUESTIONS PRESENTED

Whether the words "Territory" and "Territories" in Section 3 of the Sherman Act are limited to land areas organized by Act of Congress.

A subsidiary, but related, question is whether American Samoa has been organized by Act of Congress.

STATEMENT

The District Court dismissed this action for lack of jurisdiction. The action, brought under Section 3 of the Sherman Act, charged antitrust violations in American Samoa (Compl., par. 7). The District Court held that the word "Territories" as used in Section 3 has a political meaning, to wit, land areas organized by an organic act of Congress, not a general geographic meaning which included all land areas. It held that American Samoa is not "organized," is not thus a "Territory," and that, accordingly, the Sherman Act by its terms does not apply to American Samoa.

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1. Sections 1-2 of the Sherman Act apply, by their terms, to trade or commerce "among the several States, or with foreign nations" (15 U.S.C. §§ 1, 2), and are not here applicable. Sections 5-7 do not create substantive offenses, but relate to additional parties (§ 5), forfeiture of property in transit (§ 6), and the definition of "person" (§ 7).

A. Facts.

American Samoa is a group of seven islands in the Southwest Pacific. The islands are approximately 1,565 miles northeast of Aukland, New Zealand, and 2,276 miles southwest of Honolulu.

The islands, from east to west, are an uninhabited coral atoll; the Manua group—Ta'u (17 square miles), Olosega (2 square miles), and Ofu (3 square miles); Aunu'u (1 square mile); Tutuila (52 square miles), where the capital, Pago Pago, is located; and northward of Tutuila about two hundred miles, a low coral atoll named Swains Island, one of the Guano Islands bonded to the United States under the Act of August 18, 1856 (11 Stat. 119, 48 U.S.C. § 1411, et seq.). Altogether the total land area is 76 square miles, about the size of the District of Columbia.

Except for the two atolls, the islands are mountainous. They lack mineral resources and have limited land area suitable for agricultural purposes. Their primary asset is the harbor at Pago Pago.

In 1970, American Samoa's population was approximately 26,000; nearly all the population is Polynesian, and four-fifths live on the main island of Tutuila.[2]

1. INITIAL RELATIONSHIP OF AMERICAN SAMOA TO THE UNITED STATES.

In 1838, Lt. Charles Wilkes, U.S.N., made a survey of the Samoan Archipelago for use as a possible naval station. In 1839, Lt. Wilkes entered into commercial regulations with the principal chiefs of the Samoan Islands (eastern and western Samoa) concerning foreign shipping, but these

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2. American Samoa is the eastern portion of the Samoan Archipelago, which has a total of 15 islands. The 8 western islands have a total land area of 1,133 square miles; in the years following World War I, they were administered by New Zealand, first under a League of Nations' mandate, then as a trust territory of the United Nations. In 1962, they became the independent self-governing nation of Western Samoa.

regulations were not approved by Congress (1 Treaties and Other International Agreements of the United States of America 1776-1949, Department of State Publication 8407 [hereinafter "1 Treaties"] 3-4).

In 1879, the governments of the United States, Britain and Germany entered into an agreement with the chiefs of the Government of Samoa (eastern and western Samoa) which recognized certain neutral areas in the Samoan Islands in the event of war between the signatory nations (1 Treaties 63-64).

In 1880, after a civil war in the Samoan Islands, the United States, Britain and Germany entered into an agreement with the King and Government of Samoa, in which they undertook to support the King, to join in the selection of a successor, and to form an executive council for the King and Government of Samoa, consisting of a citizen of the United States, a British subject, and a German (1 Treaties 68-70).

On February 4, 1890, the Senate of the United States gave its advice and consent to the ratification of a "Treaty of Neutrality and Autonomous Government in Samoa (General Act of Berlin)" with Britain and Germany. Article I of the Treaty provided:

> "* * * the Islands of Samoa are neutral territory in which the citizens and subjects of the Three Signatory Powers have equal rights of residence, trade and personal protection. The Three Powers recognize the independence of the Samoan Government and the free right of the natives to elect their Chief or King and choose their form of government according to their own laws and customs. Neither of the Powers shall exercise any separate control over the Islands or Government thereof" (1 Treaties 117, 26 Stat. 1498).

The Treaty was ratified by the President of the United States on February 21, 1890, and became effective April 12, 1890.[3]

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3. The Sherman Act, including Section 3 thereof, became effective July 2, 1890 (26 Stat. 209).

2. CESSION OF ISLANDS OF AMERICAN SAMOA; ASSERTION OF JURISDICTION OVER SWAINS ISLAND.

In January, 1900, the Senate gave its advice and consent to ratification of a special convention with Britain and Germany which annulled all previous treaties, conventions, and agreements relating to Samoa (1 Treaties 276, 31 Stat. 1878). Britain and Germany renounced in favor of the United States all rights and claims with respect to the island of Tutuila, and all other islands of the Samoan group east of Longitude 171° west of Greenwich (collectively the islands of Eastern Samoa). The United States renounced in favor of the other signatories all rights and claims with respect to all islands of the Samoan group west of that Longitude (collectively the islands of Western Samoa). President McKinley ratified the convention, and it became effective February 16, 1900 (1 Treaties 276, 31 Stat. 1878).[4]

(a) Cession.

In April, 1900, the high chiefs of Tutuila ceded the two Eastern Samoan islands of Tutuila and Aunu'u to the United States. The cession was voluntary. It provided that the United States would

> "• • • respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District";

and that the Chiefs would be entitled to

> "• • • retain their individual control of the separate towns, if that control is in accordance with the laws of the United States of America concerning Tutuila, and if not obstructive to the peace of the people and the ad-

4. In February, 1900, contemporaneously with the convention, the United States Senate gave its advice and consent to ratification of a treaty which provided for a settlement of claims of citizens of the United States, British subjects and Germans on account of hostilities of the three nations in the islands of Samoa (1 Treaties 273-275, 31 Stat. 1875). The President ratified the treaty on March 5, 1900, and it became effective March 7, 1900.

vancement of civilization of the people, subject also to the supervision and instruction of said government."

In July, 1904, the King and Chiefs of Manua ceded four other islands of Eastern Samoa to the United States. The instrument of cession provided, among other things, that:

> "• • • the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized."[5]

On February 20, 1929, Congress accepted the cessions, which were ratified and confirmed as of their effective dates, 1900 and 1904 (45 Stat. 1253, 48 U.S.C. 1661(a)). The resolution of acceptance, in part, stated:

> "Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such manner as the President of the United States shall direct • • •" (45 Stat. 1253, 48 U.S.C. § 1661(c)).

(b) Swains Island.

Earlier, in 1925, Congress adopted a resolution which recited that the remaining atoll in the islands of Eastern Samoa, Swains Island, was included in the list of Guano Islands appertaining to the United States, bonded thereto under the Act of August 18, 1856 (11 Stat. 119, 48 U.S.C. § 1411, et seq.), and that the island had been in the continuous possession of the United States for over 50 years. It provided:

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5. The provisions concerning the rights of the chiefs and property rights in the 1900 and 1904 cession instruments referred to the Samoan system of communal landholding, whereby each family group under a chief ("Matai") held title to its lands in common. In 1890, the General Act of Berlin had prohibited alienations of land in the islands of Samoa to non-Samoans, "[i]n order that the native Samoans may keep their lands for cultivation by themselves and by their children after them" (1 Treaties 120). These restraints on alienation, and the communal landholding system, are still in existence in Samoa.

> "• • • sovereignty of the United States over American Samoa is extended over Swains Island, which is made a part of American Samoa and placed under the jurisdiction of the administrative and judicial authorities of the government established therein by the United States" (43 Stat. 1357, 48 U.S.C. § 1662).

Swains Island was the seventh, and last, of the islands now known as American Samoa.

B. Proceedings Below.

The District Court heard argument and received extensive briefing—two briefs by the government, two by the defendant—on the motion to dismiss, The defendant's briefs brought before the District Court statutory and other materials which showed not only why Congress excluded American Samoa from the Sherman Act, but also why it took no action to bring American Samoa under Section 3 when it enacted the Clayton amendments in 1914. The defendant's briefs, together with the public documents referred to therein, are a part of the record now before this Court.

ARGUMENT

The action of the District Court in dismissing the suit was manifestly correct, and the government's contentions to the contrary are so insubstantial as not to require further argument. Congress has consistently recognized a distinction between "Territories" and other places under the jurisdiction of the United States. So also have the decisions of this Court and the lower Federal courts. American Samoa is an unorganized possession, and thus is not a "Territory" within the meaning of Section 3 of the Sherman Act or other Federal statutes relating to "Territories."

A. Statutory Differentiation Between "Territory" and Other Possessions or Land Areas Under the Jurisdiction of the United States.

In numerous statutes, enacted both before and after the Sherman Act, Congress has consistently recognized a distinction between "Territories," on the one hand, and other land areas within the jurisdiction of the United States, on the other hand. Where the statute is intended to refer to organized Territories, the words "Territory" or "Territories" are used; where the statute is intended to have a broader application, to both Territories and possessions, the statute specifically so provides. To quote a representative cross section of the statutes:

1. STATUTES ENACTED PRIOR TO THE SHERMAN ACT.

(a) Organic Acts:

In the organic act of Wisconsin (Act of April 20, 1836; 5 Stat. 10), Congress provided:

> "• • • [t]hat from and after the third day of July next, the *country* included within the following boundaries shall constitute a *separate Territory*, for the purposes of temporary government, by the name of Wisconsin • • •" (emphasis added).

The organic acts of Utah (Act of September 9, 1850; 9 Stat. 453); Colorado (Act of February 28, 1861; 12 Stat. 172); Dakota (Act of March 2, 1861; 12 Stat. 239); Idaho (Act of March 3, 1863; 12 Stat. 808); Montana (Act of May 26, 1864; 13 Stat. 86); and Wyoming (Act of July 25, 1868; 15 Stat. 178)—all based on the Wisconsin organic act—draw a similar distinction, to-wit:

> "• • • [t]hat all that part of the *territory* of the United States included within the following limits, viz.: • • • is hereby erected into a temporary government by the name of the *Territory* of [Colorado, Dakota, etc.]" (12 Stat. 172) (emphasis added).

(b) Civil Rights Act of 1866:

"All citizens of the United States shall have the same right, in every * * * *Territory*, as is enjoyed by white citizens thereof to * * * purchase, lease, sell, hold and convey real * * * property" (14 Stat. 27, 42 U.S.C. § 1982) (emphasis added).

(c) Civil Rights Act of 1870:

"All persons within the jurisdiction of the United States shall have the same right in every * * * *Territory* to make and enforce contracts * * * as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other" (16 Stat. 144, 42 U.S.C. § 1981) (emphasis added).

(d) Civil Rights Act of 1871:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any * * * *Territory*, subjects, or causes to be subjected, any citizen of the United States or * * * person within the jurisdiction thereof to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured * * *" (17 Stat. 13, 42 U.S.C. § 1983) (emphasis added).

(e) Proof of Public Records Statute (1872):

"All records * * * which may be kept in any public office of *any* * * * *Territory, or of any country subject to the jurisdiction of the United States,* * * * shall be proved or admitted in any court or office in any other * * * *Territory, or in any such country,* by the attestation of the keeper of said records * * * *" (R.S. § 906, repealed 62 Stat. 993; a similar provision appears in the 1948 Judicial Code, 28 U.S.C. § 1739) (emphasis added).

(f) Polygamy Statute (1882):

"No polygamist, bigamist, or any person cohabiting with more than one woman * * * *in any Territory or*

other place over which the United States has exclusive jurisdiction, shall be entitled to vote at any election held *in any such Territory, or other place,* or be * * * entitled to hold office * * * in, under, or for *any such Territory or place,* or under the United States" (22 Stat. 31, 48 U.S.C. § 1461) (emphasis added).

(g) Carnal Knowledge Statute (1889):

"* * * every person who shall carnally and unlawfully know any female under the age of sixteen years * * * in the District of Columbia *or other place, except the territories,* over which the United States has exclusive jurisdiction; or on any vessel * * * out of the jurisdiction of *any State or Territory,* shall be guilty of a felony * * *" (25 Stat. 658) (emphasis added).

2. STATUTES ENACTED SUBSEQUENT TO THE SHERMAN ACT.

(h) Federal Food and Drug Act (1906):

"* * * any article of food, drug, or liquor that is adulterated or misbranded * * * and is being *transported from one State, Territory, District, or insular possession to another* for sale * * * (34 Stat. 771, repealed 52 Stat. 1059; similar provisions now appear at 21 U.S.C. §§ 301, 332, 334, 337) (emphasis added).

(i) Panama Canal Act (1912):

"* * * all laws relating to the rendition of fugitives from justice *as between the several States and Territories* of the United States, shall extend to and be considered in force in the Canal Zone, *and for such purposes and such purposes only the Canal Zone shall be* considered and *treated as an organized Territory of the United States*" (37 Stat. 569; codified in 6 C.Z.C. § 4981, 76A Stat. 547) (emphasis added).

(j) Shipping Act of 1916:

"* * * term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property

on the high seas * * * from port to port *between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession* * * * *or between places in the same Territory, District, or possession*" (39 Stat. 728, 46 U.S.C. § 801) (emphasis added).

(k) Packers and Stockyard Act of 1921:

"* * * term 'commerce' means commerce *between any State, Territory or possession,* or the District of Columbia, and any place outside thereof; * * * *or within any Territory or possession,* or the District of Columbia * * *" (42 Stat. 159, 7 U.S.C. § 182(6)) (emphasis added).

(l) Motor Carrier Act of 1935:

"* * * term 'foreign commerce' means commerce * * * *between any place in the United States and any place in a Territory or possession of the* United States * * *" (49 Stat. 544, as amended by Act of September 1, 1950, § 1(b), 64 Stat. 574; 49 U.S.C. § 303(a)(11)(B)) (emphasis added).

(m) National Labor Relations Act (1935):

"* * * term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or *between the District of Columbia or any Territory of the United States and any State or other Territory, or between* any foreign country and *any* State, *Territory,* or the District of Columbia. *or within* * * * *any Territory,* or between points in the same State but through any other State or *any Territory* or the District of Columbia * * *" (49 Stat. 450, 29 U.S.C. § 152(6)) (emphasis added)

(n) Federal "Anti-Racketeering" Act (1951):

"* * * term 'commerce' means commerce within the District of Columbia, or any *Territory or Possession* * * * all commerce *between any point in a State, Territory, Possession,* or the District of Columbia

and any point outside thereof * * *" (18 U.S.C. § 1951 (b)(3); derived from Act of June 18, 1934; 48 Stat. 979) (emphasis added).

(c) Aviation Act of 1958:

"* * * 'overseas air commerce' * * * mean[s] the carriage by aircraft of persons or property for compensation or hire * * * in commerce *between* * * * *a place in any State* * * * or the District of Columbia, *and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession* of the United States * * *" (72 Stat. 738, 49 U.S.C. § 1301 (20)(b)) (emphasis added).

Section 3 of the Sherman Act, set forth above, page 2, refers only to "Territories" and to the District of Columbia; it does not refer to other land areas under the jurisdiction of the United States. Section 7, the remaining provision of the Sherman Act which refers to "Territories," likewise does not refer to general land areas. In defining "person," it provides:

> "The word 'person' * * * in sections 1-7 of this title shall be deemed to include corporations * * * authorized by the laws of either the United States, the laws of *any of the Territories*, the laws of any State, or the laws of any foreign country" (26 Stat. 210, 15 U.S.C. § 7). (emphasis added).

In 1914, in enacting the Clayton Act and Federal Trade Commission Act, Congress again showed that it recognized the distinction between "Territory" as an organized land area, on the one hand, and other places within the jurisdiction of the United States.[6]

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6. In the present case there is no dispute as to the power of Congress under Art. IV, Sec. 3, cl. 2, to make the Sherman Act applicable to American Samoa if it wishes to do so. But as shown by

The Clayton and Federal Trade Commission Acts were enacted as supplements to the Sherman Act (Act of October 15, 1914, 38 Stat. 730; Act of September 26, 1914, 38 Stat. 717). Both were considered concurrently.

The Clayton Act defines "commerce" as follows:

> "'Commerce,' as used herein, means trade or commerce among the several States * * * or between the District of Columbia or any *Territory of the United States* and any State * * * *or between any insular possessions or other places under the jurisdiction of the United States,* or between *any such possession or place and any State or Territory of the* United States * * *" (38 Stat. 730, 15 U.S.C. § 12) (emphasis added).

When Congress provided that the Clayton Act should apply to insular possessions and other places within the jurisdiction of the United States, it specifically recognized that it was enacting a provision broader than that contained in the Sherman Act. The House Report states:

> "Section 1 of the bill [i.e., Clayton Act] defines technically for purposes of this bill certain words, phrases, and terms used in the body of the bill. * * * The definition of commerce * * * *is broadened so as to include trade and commerce between any insular possessions or other places* under the jurisdiction of the United States, *which at present do not come within the scope of the Sherman antitrust law * * * The act* approved July 2, 1890, and *commonly referred to as the Sherman Law* * * * [is] *restricted in application to commerce among the several States and Territories, the District of Columbia, and with foreign nations*" (H.Rept. No. 637, 63d Cong. 2d Sess. (1914), pp. 7-8) (emphasis added).[7]

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the text, Congress has not exercised the full extent of its power over all land areas in Section 3 of the Sherman Act, but only with respect to a specific type of land area, i.e., "Territory." Statements such as those in footnote 3, page 5, of the government's Jurisdictional Statement are, therefore, irrelevant.

7. The Clayton Bill, as originally introduced, defined commerce in the same terms as the Sherman Act (See H.R. 15657, 63d Cong.,

The Federal Trade Commission Act, which accompanied the Clayton Act, was limited to a definition of "commerce" similar to that found in the Sherman Act. Section 4 of the Federal Trade Commission Act provides:

> "'Commerce' means commerce among the several States * * * *or in any Territory of the United States* or in the District of Columbia, or *between any such Territory and another*, or *between any such Territory* and any State * * * or between the District of Columbia and any State or *Territory* or foreign nation" (38 Stat. 719, 15 U.S.C. § 44) (emphasis added).

The bill, as originally introduced, defined commerce as broadly as did the Clayton Act, although in different terms:

> "'Commerce' means such commerce as Congress has the power to regulate under the Constitution" (H.R. 15613, 63d Cong., 2d Sess., § 6).

That the bill, as enacted, contained a narrower definition of commerce was clearly understood. The House debates show the following exchange:

> "MR. SHERLEY. In the bill as it passed the House the definition of commerce was, in substance, that over which Congress has jurisdiction by virtue of the Constitution of the United States. In the bill as agreed to in conference the definition of commerce would seem to exclude commerce with any possessions of the United States that were not States or Territories or the District of Columbia.
>
> "MR. COVINGTON. That is correct" (51 Cong. Rec. 14927 (September 10, 1914)).

2d Sess., § 1). In subsequent revisions by the House Judiciary Committee, the definition of commerce was expanded to include trade between insular possessions and other places within the jurisdiction of the United States, as well as between the States, Territories, and foreign nations (H.Rept. No. 637, 63d Cong., 2d Sess. (1914), p. 1). This broadened definition of "'commerce'' only applies to the Clayton Act (51 Cong. Rec. 9088 (May 22, 1914); 51 Cong. Rec. 12988 (July 30, 1914); 51 Cong. Rec. 13848 (August 17, 1914)).

As to the reasons for this limitation of jurisdiction of the Federal Trade Commission, one of the managers of the bill stated:

> "The reason was that we did not think that the scope of the commission should be extended that far, to embrace our foreign possessions. That conditions there are so different than here that they could be handled by local authorities better than by a commission 7,600 miles away in the city of Washington. If the scope of the commission needs to be extended hereafter to any of them, it can be done, but at present we thought it would hamper rather than to help business there and here" (51 Cong. Rec. 14935 (September 10, 1914)).

When Congress has intended the term "Territory" in a statute to mean something other than an *organized* territory it has so stated. In addition to the examples quoted above, the Wool Products Labeling Act, for instance, provides: "[t]he term 'Territory' includes the insular possessions of the United States, and also any Territory of the United States" (Act of October 14, 1940, § 2(i), 54 Stat. 1129; 15 U.S.C. § 68(i)). Here, as uniformly elsewhere, Congress has expressly recognized the historical distinction it has made between "Territory" and other possessions over which it has jurisdiction.

B. Cases Recognizing the Statutory Distinctions Between Territories and Other Possessions.

This Court and the lower Federal courts have, without exception so far as we have been able to determine, recognized the distinction made by Congress between "Territories" and other areas under the general sovereignty of the United States.

In *Ex Parte Morgan* (W.D.Ark. 1883) 20 Fed. 298, a case involving the meaning of "Territory" in the Extradi-

tion Statute (R.S. § 5278), the issue was whether the Chief of the Cherokee Nation, an area under a local Indian government, was the Executive Authority of a "State or Territory." The court held that he was not. It said:

> "A *territory,* under the constitution and laws of the United States, is an inchoate state,—a *portion of the country not included within the limits of any state,* and not yet admitted as a state into the Union, *but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States*" (20 Fed. 298, 305) (emphasis added).

In 1890 the Carnal Knowledge Statute was before the Supreme Court in *In Re Lane* (1890) 135 U.S. 443. By its terms, the statute was applicable in areas under the jurisdiction of the United States "except the territories." The issue was whether petitioner, who was alleged to have committed the offense charged within that part of the Indian Territory then known as Oklahoma, which had no organic act, could claim that this was a "territory" within the exception. The Court said that he could not. It held:

> "• • • the words 'except the territories' have reference exclusively to that system of *organized* government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system. *They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress; and their legislative acts are subject to the disapproval of the Congress of the United States*";

and added:

> "• • • *they exercise nearly all the powers of government, under what are generally called organic acts passed by* Congress conferring such powers on them.

It is this class of government, long known by the name of Territories, that the act of Congress exempts from the operation of this statute * * *" (In Re Lane* (1890) 135 U.S. 443, 447) (emphasis added).[8]

In *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, this Court was called upon to decide whether Section 3 of the Sherman Act applied to Puerto Rico. Congress had adopted an organic act for Puerto Rico in 1900, after its cession from Spain (Foraker Act; 31 Stat. 77). A revised organic act had been adopted by Congress in 1917 (Organic Act of March 2, 1917; 39 Stat. 951). The alleged violations had occurred in the 1930's.

The Court said that it was immaterial that Puerto Rico was not a dependency of the United States at the time Section 3 was enacted. The test, it held, was whether Puerto Rico had an organic act at the time of the alleged violations. To quote the Court:

> "Section 3 of the Sherman Act extends to 'any territory of the United States.' * * * The only question, therefore, is whether the word 'territory,' as used in § 3 of the Sherman Act, properly can be applied to a dependency *now bearing the relation to the United States which is borne by Puerto Rico*" (302 U.S. 253, 257) (emphasis added).[9]

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8. *In Re Lane*, holding that the term "Territories" means "organized" Territories, was decided April 28, 1890, just two months before passage of the Sherman Act (July 2, 1890). If Congress had intended the term "Territories" in the Sherman Act to mean something different, it had opportunity so to provide.

9. The District Court opinion (Jurisdictional Statement, p. 12) refers to a dictum in *Shell Co.*, omitted from the above quotation, which stated that when the Sherman Act was passed in 1890, the United States had no insular dependencies (302 U.S. 253, 257). However, this dictum was incorrect.

In the *Insular Cases* (*Downes v. Bidwell* (1901) 182 U.S. 244, 304) Justice White pointed out that numerous islands had been brought within the dominion of the United States under the authority of the Act of August 18, 1856, c. 164 (Guano Islands Act);

As to what Congress meant by "Territory" in the Sherman Act, the Court referred to its earlier decision in *Kopel v. Bingham* (1909) 211 U.S. 468, where it defined "territory" under the Extradition Act (R.S. § 5278):

> "• • • we held in *Kopel v. Bingham* that Puerto Rico was a 'territory' within the meaning of § 5278 of the Revised Statutes, which provides for the demand and surrender of fugitive criminals by governors of territories as well as of states. • • • The word 'territory' as used in that statute was defined as meaning 'a portion of the country not included within the limits of any State, and not yet admitted as a State into the Union *but organized under the laws of Congress with a separate legislature under a territorial governor and other officers appointed by the President and Senate of the United States.*' And the court concluded, 'It may be justly asserted that *Puerto Rico* is a *completely organized Territory* • • • '
>
> "With equal force, it may be said here that there is no reason why Puerto Rico should not be held to be a 'territory' within the meaning of § 3 of the Sherman Act" (302 U.S. 258-259) (emphasis added).

---

these included Swains Island, one of the Samoan group, which had been in continuous possession of the United States since at least 1875 (43 Stat. 1357). In 1867, the United States acquired Midway Island, at the western end of the Hawaiian group 1200 miles from Honolulu, and by 1900 had expended $50,000 to make it into a naval station (182 U.S. 244, 304). On renewal of a treaty with Hawaii, November 9, 1887, Pearl Harbor in the Hawaiian Islands was leased as a permanent naval station *(ibid.)*.

Under the Guano Islands Act (1856), Congress granted monopoly rights to the discoverer. Section 2 provided that:

> "The discoverer • • • may be allowed, at the pleasure of Congress, the *exclusive right* of occupying such island, • • • for the purpose of obtaining Guano, and of selling • • • the same to citizens of the United States" (11 Stat. 119, 48 U.S.C. § 1411, et seq.) (emphasis added).

The rights of the United States in the guano islands were known to Congress at the time the Sherman Act was passed. Indeed, two cases involving a guano island were decided shortly thereafter by this Court (*Jones v. United States* (1890) 137 U.S. 202; *Duncan v. Navassa Phosphate Co.* (1890) 137 U.S. 647).

In elaboration, the Court went on:

> "If * * * Congress intended by the Sherman Act to exert all the power it possessed in respect of the subject matter—trade and commerce—, it is equally reasonable to conclude that Congress intended to include all *territories* to which its powers might extend. * * * we hold, accordingly, that the word 'territory' was used in its most comprehensive sense, as embracing *all organized territories,* whether incorporated into the United States or not, including Puerto Rico" (302 U.S. 253, 259) (emphasis added).[10]

In *David Cabrera, Inc. v. Union de Choferes y Duenos* (D. Puerto Rico 1966) 256 F.Supp. 839, the District Court recently held that the statutory term "Territory" referred to an area in a political sense, i.e., as organized, rather than as synonomous with "place" or "area" in the geographical sense. At issue was the meaning of "Territory" as used in the definition of "Commerce" in Section 1 of the Clayton Act. The court said:

> "It is obvious from 15 U.S.C.A. § 12 [Clayton Act, 38 Stat. 730, § 1] that Congress is not using the term 'territory' in its broad meaning. Its use, together with the use within the same statute of the terms 'State', 'District of Columbia', 'foreign nation', 'insular possession' and 'place' under the jurisdiction of the United States, indicates the intent of Congress to be precise

10. In *Shell Co.*, the defendant contended that the term "Territory" meant only incorporated Territory, citing the *Insular Cases* (1901) 182 U.S. 1, et seq. An incorporated Territory is one to which all the guarantees of the Federal Constitution extend (*Downes v. Bidwell* (1901) 182 U.S. 244, 299 (White, J., concurring)). An "unincorporated" Territory is one to which only a part of the constitutional guarantees extend, the remainder (if any) being defined in a statutory bill of rights included under the organic act (see, e.g., Organic Act of Guam, Aug. 1, 1950; 64 Stat. 384, as amended; 48 U.S.C. § 1421, et seq.).

In *Shell Co.*, the Court refused to limit the term "Territory" to incorporated Territory; as noted, it employed the term in its broadest sense as used by Congress, i.e., as including all organized Territories (302 U.S. 253, 258-259).

in the terminology used in this statute. The above intent was to refer to territory in its political sense" (256 F.Supp. 839, 842).

The same analysis, of course, applies to the use of the term "Territory" in Section 3 of the Sherman Act; there the Act within the same section uses the terms "State," "District of Columbia," and "foreign nation." As noted by this Court in analyzing the meaning of "States":

> "Ordinarily these terms ['States of the Union'] would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, *as distinguished* from *the organized municipalities* known as *Territories and the District of Columbia" (Geofroy v. Riggs* (1890) 133 U.S. 258, 268) (emphasis added).

While the government makes broad arguments (Jurisdictional Statement, pp. 6-8) that the term "Territory" in Section 3 must be construed to include all land areas, these arguments are based upon what the government wishes the statute might have been, not on what the statute says. In *Shell Co.,* as elsewhere, the Court recognized that the term "Territory" in a statute, though used in its most comprehensive sense, still has a meaning which does not include all land areas (302 U.S. 253, 259).[11]

C. American Samoa Is Not a Territory.

American Samoa is not a "Territory" within the meaning of the Sherman Act. It is an unorganized insular possession. Until it receives an organic act from Congress, it will remain in its present status.

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11. In *Vermilya-Brown Co. v. Connell* (1948) 335 U.S. 377, 388, cited by the government, this Court noted that the National Labor Relations Act in its reference to "Territory" has a more limited jurisdictional scope than other acts of Congress, which refer to "Territories or possessions" (e.g., Fair Labor Standards Act of 1938, 52 Stat. 1060; 29 U.S.C. § 203(c), which provides "'State' means any State of the United States or the District of Columbia or any Territory or possession of the United States").

In 1900, three days after the treaty which awarded the islands of Eastern Samoa to the United States (1 Treaties 277, 31 Stat. 1879), the President by Executive Order placed the islands of Eastern (American) Samoa under Naval Administration. The order provided:

> "The Island of Tutuila, of the Samoan group and all other islands of the group east of Longitude 171 degrees west of Greenwich are hereby placed under the control of the Department of the Navy, for a Naval Station. The Secretary of the Navy will take such steps as may be necessary to establish the authority of the United States, and give to the islands, the necessary protection" (Executive Order, President McKinley, February 19, 1900).

In 1929, when Congress accepted the 1900 and 1904 cessions of the six principal islands of American Samoa by the Samoan Chiefs, it did not adopt an organic act for the area.[12] Instead, in its resolution of acceptance, Congress stated:

> "Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President shall direct; and the President shall have power to remove said officers * * *" (Resolution of February 24, 1929, 45 Stat. 1253; 48 U.S.C. § 1661(c)).[13]

---

12. Swains Island, as previously noted (p. 6), was unilaterally placed under the control of the United States in 1925, by resolution of Congress. The resolution did not provide an organic act (Resolution of March 4, 1925, 43 Stat. 1357; 48 U.S.C. § 1662).

13. In *Smith v. Government of Virgin Islands* (3 Cir. 1967) 375 F.2d 714, the Court of Appeals held that a nearly identical resolution did not create organic status for the Virgin Islands (acquired from Denmark in 1917; 39 Stat. 1132). The Court said that "Congress had not established for them a formal or detailed plan of government, but had adopted a stopgap arrangement * * *" (375 F.2d 710). An organic act was enacted for the Virgin Islands in 1936 (49 Stat. 1807, 48 U.S.C. § 1405, et seq.).

In 1951, the President transferred administration of American Samoa from the Secretary of the Navy to the Secretary of the Interior. The order provided that:

> "When the transfer of administration made by this order becomes effective, the Secretary of the Interior shall take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of civil government in American Samoa" (Executive Order No. 10264, June 29, 1951, 16 F.R. 6419, par. 3).[14]

Since 1951, American Samoa has been under the control of the Department of the Interior, with a civilian governor and other officials being appointed by the Secretary of the Interior or with his consent. Although a measure of self-government was granted American Samoans under a local constitution adopted in 1961, revised in 1968, this "constitution is but an administrative order, subject to the will of the Executive in Washington" (1961 Study Mission Report, p. 5).

Under the administration of the Department of the Interior, the government has followed a policy of preserving the Samoan way of life. This way of life is reflected in the tribal ("matai") system. The matai are the chiefs of the families or tribes (Aiga). Each tribe communally owns

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14. The Navy did "little to disturb the Samoan system of local government," choosing always to pursue a policy of "indirect rule through the Samoan chiefs" (Study Mission to Eastern [American] Samoa, Senate Comm. on Interior and Insular Affairs, *Report Pursuant to S.Res. 330, 86th Cong., 2d Sess.*, S.Doc. 38, 87th Cong., 1st Sess. (1961) [hereinafter "1961 Study Mission Report"], p. 112). The Navy's basic policies included:

"(a) Nonalienation of Samoan lands.
(b) Preservation of Samoan customs.
• • • • •
(e) Samoa for the Samoans."

(Darden, *Historical Sketch of the Naval Administration of the Government of American Samoa, April 17, 1900-July 1, 1951* (1952), p. xiii).

the lands surrounding its villages. In excess of 96 per cent of the land in American Samoa is tribal owned, not subject to alienation, and used strictly in accordance with the direction of the matai of the tribe to which it belongs (1961 Study Mission Report, p. 124).

All affairs of each tribe are settled in its own council presided over by the matai (1961 Study Mission Report, p. 113). In 1932 hearings on American Samoa, Congressman Beedy said:

> "I think these people are the happiest I have ever known. They live as near to the communistic theory as any people I have ever contacted. There is no such thing as individual ownership of lands. Title to these lands comes on down through generations in the family.
>
> "The family group is presided over by a 'matai,' or chieftan. His word is law within the family group. He presides over a group ordinarily ranging from 30 to a hundred or more in numbers" *(Hearings on H.R. 9698 Before the House Comm. on Insular Affairs,* 72d Cong., 1st Sess. (1932), p. 14);

adding:

> "Our whole thought has been * * * *to keep the hand of the white man out of their affairs* just as much as possible. I am not sure but what, in the eyes of the Ruler of Nations, they have devised a finer system of living than many so-called great nations" (*id.,* p. 18) (emphasis added).

In 1931, 1933, 1935, 1937, 1947, and again in 1949, organic acts were proposed for Samoa, but failed to pass in Congress (S. 5621, H.R. 15989, 71st Cong., 1st Sess. (1931); S. 417, H.R. 9698, 72d Cong., 2d Sess. (1932); S. 1574, H.R. 8749, 73d Cong., 2d Sess. (1933); S. 3113, H.R. 11044, 74th Cong., 1st Sess. (1935); S. 1095, H.R. 4946, 75th Cong., 1st Sess. (1937); S. 1898, H.R. 3564, 80th Cong., 1st Sess. (1947); S. 184, H.R. 4500, 81st Cong., 1st Sess. (1949)). The reasons were essentially that Samoans feared that

an organic act would destroy their way of life, with its government through the matai system of chieftains, and its restrictions on alienation of land to non-Samoans.[15] As stated in the 1961 Study Mission Report (p. 125), if American Samoa were

> "opened to unrestricted economic exploitation * * *, it is the consensus of opinion that it would only be a matter of time before the Samoan way of life would disappear. Samoans refer to the history of their Polynesian relatives in Hawaii * * * as proof of basis for this fear."

In 1970, a special commission was appointed by the Samoan "fono" (legislature) to study alternative forms of political status open to American Samoa and to assess the advantages and disadvantages of each (11th Samoan Legislature, First Special Session, July 1969, P.L. 11-39). The Commission considered the following alternatives: (1) independence; (2) union with Western Samoa; (3) becoming an incorporated territory of the United States under an Organic Act; (4) Commonwealth status similar to Puerto Rico's; (5) becoming a county within the State of Hawaii; and (6) "[r]etaining American Samoa's present status as an unincorporated insular possession of the United States" (*Report from the Future Political Status Study Commission to the Eleventh Legislature of American Samoa, Second Regular Session* (February 9, 1970) [hereinafter "Political Status Report"], pp. 1-3).

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15. In 1950, a congressional committee reported that Samoans favored an organic act only under certain conditions (Report to Public Lands Committee on the Pacific Islands, 81st Cong., 2d Sess. (1950), p. 2). For example, Samoans did *not* want an Act which prevented "involuntary servitude" because it would "destroy an integral part of the matai system." Even more startling, the Committee recommended acceptance of the condition, saying:

> "[The committee] regards the matai system as undemocratic and inconsistent with American principles, but at the same time it recognizes the upheaval that would follow if so ancient and strongly rooted a tradition were legislated out of existence" (*id.*, p. 7).

The Commission in its report to the Samoan legislature noted the advantages and weaknesses of the various alternatives; it recommended, in essence, a retention of the status quo. The Commission said that it did not believe that organic act status was feasible or desirable at the present time, and recommended against an organic act. It said:

> *"The major disadvantage of Organic Act status would be the threat it would pose to the traditional Samoan social structure.* Even if Congress could be persuaded to allow local legislation protecting the Samoan land-tenure and matai-title systems, such legislation might well be held unconstitutional. As the Honorable Albert B. Maris, while a judge of the Third Circuit, United States Court of Appeals wrote to the Secretary of the Interior on October 3, 1960: '. . . the people of Samoa, as their constitution indicates, cling with remarkable tenacity to their ancient customs and their communal family land holdings and way of life with its matai system of titled and privileged heads of families set above the untitled people of the community. *For 60 years the United States has recognized and supported these customs. But they are wholly inconsistent with our American System of individual enterprise and property rights and they would, therefore, be doomed to ultimate destruction if we should set upon a course of preparing the people for American citizenship with the accompanying constitutional obligation to accord stateside American citizens equal rights in property and commerce in Samoa'"* (Political Status Report, pp. 16-17) (emphasis added).

In short, it is true today, as it was in 1947 when the United States reported to the Secretary General of the United Nations, that

> "American Samoa is classified as an *unorganized United States possession*" (1947 Annual Report to the Secretary General of the United Nations pursuant to Article 73(e) of the Charter, p. 30) (emphasis added).

That the Sherman Act, or any other statute limited in its applicability to "Territories," does not extend to an unorganized possession such as American Samoa, both as a matter of Congressional intent and as a matter of judicial interpretation, is clear from the authorities above set forth. A further well-reasoned opinion of the National Labor Relations Board in *Star-Kist Samoa Inc.* (N.L.R.B. 1968) 68 L.R.R.M. 1532, is directly on point. The National Labor Relations Act extends, in words almost identical to Section 3 of the Sherman Act, to:

> "* * * trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or *any Territory of the United States and any State or other Territory,* * * * or within * * * any *Territory* * * *" (49 Stat. 450, 29 U.S.C. § 152(6)) (emphasis added).

The issue before the Board was whether the Act extended to American Samoa. The Board found that it did not:

> "American Samoa is neither 'incorporated' nor 'organized.' It does not have even a rudimentary government established by Congress, but rather one established by the executive branch in the person of the Secretary of the Interior, to whom administrative authority was delegated by the President. It is not specifically included as a territory in Section 14(c)(2). Further distinguishing American Samoa from those dependencies of the United States which have been found to be 'Territories' is the fact that its inhabitants, while American Nationals, are not citizens, that it is not within the jurisdiction of any Circuit Court, and that it has no Federal District Court" (68 L.R.R.M. 1533).

The Board held:

> "Under all of the relevant circumstances, particularly the fact that Congress has not established any form of self government for American Samoa, and

in the absence of a clear Congressional mandate, we conclude that American Samoa does not come within the jurisdiction of the Act" (68 L.R.R.M. 1533).[16]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the District Court should be affirmed, or in the alternative that the appeal should be dismissed for lack of a substantial Federal question.

Respectfully submitted,

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16. The government suggests (Jurisdictional Statement, p. 7) that there is something startling in the holding below that Congress has excepted the economic development of American Samoa "from the principles of free competition which underly the Sherman Act." Yet the holding is hardly surprising, in view of the fact that Congress has similarly excepted American Samoa from the National Labor Relations Act, the Civil Rights Acts of 1866, 1870 and 1871, and from basic constitutional guarantees—all of which are of no lesser significance than the Sherman Act.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA,

Appellant

v.

STANDARD OIL COMPANY OF CALIFORNIA

On Appeal from the United States District Court
for the Northern District of California

Petition for Rehearing

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-527

UNITED STATES OF AMERICA,

Appellant

v.

STANDARD OIL COMPANY OF CALIFORNIA

On Appeal from the United States District Court
for the Northern District of California

Petition for Rehearing

Appellee Standard Oil Company of California files this petition to request a rehearing of the *per curiam* decision handed down by the Court in this case on January 24, 1972.

PRELIMINARY STATEMENT

In its summary disposition of the appeal herein, the Court states *per curiam:* "We note probable jurisdiction and reverse." The opinion concludes, after brief reference to *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, which both appellant[1] and appellee agree did not reach the question

1. The Solicitor General's Jurisdictional Statement states, at pages 5-6: "There was no issue in *Shell* whether Section 3 applies to unorganized territories, and the Court had no occasion to consider, let alone decide, that question."

here presented: "We discern no reason, *and appellee suggests none,* why Congress would have wished to exclude unorganized territories from the coverage of Sec. 3" (emphasis added).

It appears that the Court was not apprised of appellee's Motion to Affirm which was devoted entirely, albeit briefly because of anticipated extensive briefing and argument if the motion were denied, to these propositions:

1. The Sherman Act, Section 3, by its specific terms applies to commerce in and between "Territories," States, the District of Columbia and foreign nations.

2. Congress has from the beginning of our history distinguished between "Territories" and other lands under the jurisdiction of the United States. When it has used the word "Territories" in a statute it *always* meant areas organized by an Organic Act of Congress, and has *never* meant unorganized areas or possessions. *Not one exception can be cited to the contrary.*

3. Congressional reports show that Congress *knew it had limited the applicability of Section 3* of the Sherman Act to organized areas by using the term "Territories."

4. This Court has *without exception,* up to the disposition of this case, effectuated Congressional intent by limiting the applicability of a statute extending to "Territories" to those land areas organized by an Act of Congress; *Puerto Rico v. Shell* by dictum reaffirms this Court's consistent position in this regard insofar as Section 3 of the Sherman Act is concerned.

5. With specific reference to American Samoa, Congress has *time after time after time* considered whether it should be the subject of an Organic Act with the consequent applicability of the laws (including the antitrust laws) and judicial system of the United States or whether it should be left an unorganized possession under the paternalistic care of the Secretary of the Interior. In each instance *Congress consciously chose not to pass an Organic Act* for the very reason that it

and the Samoans *did not want* the laws of the United States made applicable to American Samoa.

Appellee respectfully petitions for a rehearing, urging in support the following elaboration of the above points.

A. Facts.

This action is brought under Section 4 of the Sherman Act (26 Stat. 209, as amended; 15 U.S.C. § 4). The complaint alleges a violation of Section 3 of that Act (26 Stat. 209; 15 U.S.C. § 3) charging that:

> "• • • defendant has engaged in a combination or conspiracy and has entered into long-term requirements contracts in unreasonable restraint of, and has engaged in a combination and conspiracy to monopolize for the defendant, the distribution and sale of petroleum products in the *Territory of American Samoa,* in violation of *Section 3 of the Sherman Act*" (Compl., par. IV 7) (emphasis added here and throughout unless otherwise stated).

Section 3 of the Sherman Act extends to conspiratorial restraints on trade or commerce:

> "• • • in any Territory of the United States or of the District of Columbia, or • • • between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations • • •" (15 U.S.C. § 3).

Clearly American Samoa is not the "District of Columbia," it is not a "State" and it is not a "foreign nation." The issue raised by the present petition is therefore this: Is American Samoa a "Territory" within the meaning of Section 3 of the Sherman Act as the complaint alleges? We submit that it clearly is not, and that for this reason

the District Court has no jurisdiction over the subject matter of this action.

B. Outline of Argument.

Outside of the States themselves and the District of Columbia, there are a number of land areas, mostly islands, owned by the United States. By virtue of Article IV of the Constitution,[2] Congress has legislative jurisdiction over all these areas.

In exercising its legislative jurisdiction, however, Congress has not treated all of these land areas alike. Important for present purposes is the fact that it has defined "Territories" to include only certain of the land areas, namely *those to which Congress has given a civil government by virtue of an Organic Act* setting up (1) a separate legislature, (2) under a territorial governor and other officers appointed by the President and Senate, and (3) with courts integrated into the Federal system. Such an area is said to be "organized" and by virtue of its organization becomes a "Territory."

On the other hand, if Congress has *not* established civil government for a land area by passage of an Organic Act, but rather has left administration of the area in the hands of the President, then the area is not "organized" and it is not a "Territory." It is, for Congressional purposes, an "unorganized" possession.[3]

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2. "The Congress shall have Power to • • • make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States • • •" (U.S.Const., Art. IV, § 3, cl. 2).

3. Care must be taken not to get lost in semantics. The word "territory" can be, and often is, used in the *geographic* sense to mean a land area. As we point out below, in defining the applicability of its statutes, Congress uses the term in its *political* sense, i.e., to mean an *organized* land area, and this use by Congress has been recognized and confirmed without exception by this Court and the lower Federal courts (infra, pp. 26-38).

Congress provides in some statutes that they are to apply to both "Territories" and unorganized "possessions." Others, Congress directs, shall apply only to "Territories." Section 3 of the Sherman Act is in this latter category in that it extends only to "Territories." Because American Samoa is *not* organized, it is not a "Territory" as the complaint alleges; Section 3 is thus not applicable and the District Court is without jurisdiction.

We present our argument in three parts. First, we discuss the political, social and economic life in American Samoa. From this discussion it will at once appear why Congress would never intend to apply a complex regulatory law such as the Sherman Act to the tribal society that exists in Samoa. But we go further. We document the repeated requests of the Samoan people, always acceded to by the Congress, that Samoa not be "organized" because the consequent applicability of our laws would "be the death knell" for Samoan tribal life (see infra, pp. 10-19). Above all, the Samoans, supported by a solicitous Congress, wanted no part of American competition or free competitive forces in their market place. Because the protection of free competition is the only function or purpose of the Sherman Act, its applicability to Samoa was patently not wanted and not intended.

Second, we review the authorities—which were not mentioned by this Court in its *per curiam* opinion—that support without exception the proposition that when Congress makes a statute applicable to "Territories," it intends that it apply only to possessions which are "organized," that is, those for which an Organic Act has been enacted. By reference to unambiguous Congressional expressions of intent as well as to pertinent case law, we show why this is particularly true as to Section 3 of the Sherman Act.

Finally, we point out why Samoa is not a "Territory" but is an "unorganized" insular possession, and we discuss the only case of which we know that has passed squarely on the point. It holds that a statute (National Labor Relations Act) made applicable to "Territories" does not apply to American Samoa.

DISCUSSION

A. The Constitution and Laws of the United States Including the Sherman Act Are Inimical to the Political, Social and Economic Life in American Samoa; for This Specific Reason, the Samoans Do Not Want Our Laws and the United States Has Purposely Not Imposed Them.

The fact that the Sherman Act does not apply in American Samoa is not shocking or even surprising. Most of the Constitution and laws of the United States have no force or effect there. Theirs is a primitive, tribal system, called "Matai," which has existed "for hundreds, if not thousands of years" and which, according to Judge Maris, is "wholly inconsistent with our American System of individual enterprise and property rights and • • • would, therefore, be doomed to ultimate destruction" were we to impose on Samoans "American citizenship with the accompanying constitutional obligation to accord stateside American citizens equal rights in property and commerce in Samoa."[4] Indeed, for this very reason a Political Status Study Commission appointed to study and recommend a future form of government for American Samoa urged *just two years ago* against an Organic Act because of the "threat it would pose to the traditional Samoan social structure"; because it

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4. *Report from the Future Political Status Study Commission to the Eleventh Legislature of American Samoa, 2d Reg. Sess. (1970)* [hereinafter *"Political Status Report"*], pp. 16-17. The *Political Status Report* and the Appendix thereto are set forth in Appendix A to this Petition for Rehearing.

"would probably be the death knell for Samoan custom" (*Political Status Report*, pp. 16, 17).

In elaboration, the Commission stated that "an Organic Act passed by Congress would not be likely to permit the continued legal protection of the Samoan land and matai systems" because these "institutionalized aspects of traditional Samoan life are profoundly antithetical to the principle of equal rights to all citizens which is embodied in the American Constitution" (id., pp. 15-16).

As long as the tribal system is to be the way of life in American Samoa, our laws are not wanted and they are not needed.

1. SIZE, LOCATION AND POLITICAL HISTORY OF AMERICAN SAMOA.

American Samoa is made up of seven islands located in the South Pacific approximately 2,700 miles southwest of Honolulu and 1,600 miles northeast of New Zealand. It has a population of around 28,000 people, mostly Polynesian. Eighty per cent of the people live on Tutuila which has an area of 52 square miles. American Samoa is mountainous and has substantially no mineral resources or arable land.

While American interest in Samoa goes back as far as 1839, it was by a treaty in 1899 that Britain and Germany recognized the claim of the United States and renounced their own. In 1900 and 1904, the High Chiefs of the various islands now known as American Samoa ceded them to the United States, a cession which Congress did not accept until February 20, 1929. Congress accepted the islands retroactively and declared that until *it* (Congress) should provide for the government of the islands of American Samoa, *all* of the governmental powers were vested in the President of the United States or such person as he might designate (45 Stat. 1253; 48 U.S.C. § 1661 (c)). The Presi-

dent first delegated governing power to the Secretary of the Navy and, in 1951, transferred administration to the Secretary of the Interior, where it is today. The Political Status Study Commission pointed out in the Appendix to its *Political Status Report* (p. 1):

> "At present, American Samoa is an unincorporated, insular possession of the United States, governed by an appointed Governor and an elected legislature, acting under authority granted them by the Secretary of the Interior, who in turn has been delegated his authority by the President, to whom Congress granted authority over Samoa in the Act of February 20, 1929."

While American Samoa has a constitution, "the fact remains that all executive, judicial, and legislative power is concentrated in the Secretary of the Interior through the President. Legally, the American Samoa constitution is but an administrative order, subject to the will of the Executive in Washington."[5]

Because Samoans wish above all else to maintain their age-old tribal society, they fear any change in their present political status. The Political Status Study Commission concluded that an Organic Act and the accompanying imposition of our laws would be the "death knell for Samoan custom." The same fear was reflected in the *1961 Study Mission Report*. That *Report* pointed out (p. 125) that if American Samoa were:

> "• • • opened to unrestricted economic exploitation • • •, it is the consensus of opinion that it would only be a matter of time before the Samoan way of life would

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5. *Study Mission to Eastern [American] Samoa, Senate Committee on Interior and Insular Affairs, Report Pursuant to S.Res. 330, 86th Cong., 2d Sess., S.Res. 38, 87th Cong., 1st Sess. (1961)* [hereinafter *"1961 Study Mission Report"*], p. 5. The *1961 Study Mission Report* and the other sources cited in this Petition for Rehearing which deal with Samoa were filed in the District Court. They are part of the record in this Court.

disappear. Samoans refer to the history of their Polynesian relatives in Hawaii * * * as proof of basis for this fear."

2. DESCRIPTION OF THE MATAI SYSTEM, WHICH THE SAMOANS WISH TO PROTECT AND PRESERVE.

The "Matai System" is economic, it is political and it is social. It is a tribal way of life which has existed, essentially unchanged, for hundreds if not thousands of years.[6] The Matai are the chiefs of the families or tribes (Aiga). Each tribe communally owns the lands surrounding its villages. In excess of 96 per cent of the land in American Samoa is tribally owned, is not subject to alienation and is used strictly in accordance with the direction of the Matai of the tribe to which it belongs (*1961 Study Mission Report*, p. 124).

All affairs of each tribe are settled in its own council presided over by the Matai. The various Matais or chiefs in turn form an overall council (Fono) which, under Department of Interior rule, has become the "Senate" of the Samoan legislature. The "House" members of the legislature are not chiefs but the popularly elected representatives of the various villages and tribes. While this appears to be an erosion of the ancient rule of the Matais, the *1961 Study Mission Report* observed (p. 115):

> "There is the suspicion that the direction of the matais to their families to register and thereafter their instructions on how to vote still looms large as a factor

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6. "The entire social structure is based on an intricate, far-reaching system of traditional family relationships, often referred to as the 'matai' system. * * *

> "* * * the matai system is far more than a means of communal landholding. It is a social pattern extending into virtually every phase of Samoan life, controlling the economic as well as the social relationships of the Samoans" (*1961 Study Mission Report*, pp. 2-3).

determining political participation and the outcome of elections."

Despite its undemocratic, primitive nature, the pervasive Matai system is what the Samoans want and, as noted above, the fear of its being weakened and ultimately displaced has led Samoans to oppose passage of an Organic Act and the consequent applicability of our laws.

3. THE UNITED STATES HAS FOR 70 YEARS HONORED THE SAMOANS' DESIRES AND HAS CONSISTENTLY PROMOTED AND PROTECTED THE MATAI SYSTEM.

It will be recalled that shortly after the chiefs ceded what is now American Samoa to the United States, the President placed the islands under the administrative jurisdiction of the Department of the Navy. For nearly 50 years the Navy did "little to disturb the Samoan system of local government," choosing always to pursue a policy of "indirect rule through the Samoan chiefs" (*1961 Study Mission Report*, p. 112). As the first commandant wrote on May 1, 1900:

> "The Government which I propose to establish for these islands is a government of the chiefs, who are to receive additional appointments to their positions from the Commandant of the Station.'"[7]

The basic policies followed by the Navy were:

(a) Nonalienation of Samoan lands.
(b) Preservation of Samoan customs.
(c) Nonexploitation of the people and their resources.
(d) Promotion of public health and education.
(e) "Samoa for the Samoans" (*Darden*, p. xiii).

At Congressional hearings in 1928, there were those who urged Congress to pass an "organic law" for the "insular

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7. Darden, *Historical Sketch of the Naval Administration of the Government of American Samoa, April 17, 1900-July 1, 1951* (1952) [hereinafter "*Darden*"], p. 5.

possession" of Samoa because "[n]o scheme of government has ever been formulated by the Congress extending the Constitution or the Government of the United States to Samoa * * * ."[8] The Secretary of the Navy, however, did not agree with this suggestion, stating, "The Navy Department is of the opinion that the administration of American Samoa is working smoothly, efficiently, and effectively, and to the benefit of the native inhabitants of the islands" (*1928 Joint Hearings*, p. 31). A prior commandant testified, "It is absolutely necessary to have more or less of an autocratic power over a primitive people. The Samoans are primitive" (id., p. 34). Further characterizing the Samoans, the commandant said (id., p. 34):

> "They are the happiest people in the world. I do not think there is any doubt about that. They spend their lives mostly in feasting and song and dancing. They have to do very little work. God is good to Samoa—God certainly is good to Samoa. They do not average, say, more than an hour a day on their plantations, and that work is done in the very early morning. So that for the long period of our day they have nothing to do. They love to sit with their backs against the posts in their houses and talk. They are not doers; they are talkers; and very fine, eloquent talkers; lovable people, a very hospitable people, very well pleased with themselves, more or less like children; and they are again and again referred to by historians as children."

He was asked by a Senator if he thought Samoans would be better off and happier 50 years hence if Congress passed laws and appropriated money for the purpose of "Americanizing those natives." His answer was, "Certainly not. *They will be less and less happy all the time, and I am not*

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8. *Joint Hearings on S.Con.Res. 2 Before the Senate Committee on Territories and Insular Possessions and the House Committee on Insular Affairs, 70th Cong., 1st Sess. (1928)* [hereinafter "*1928 Joint Hearings*"], p. 26.

in favor of Americanizing them" (id., p. 42). According to the witness, "the laws • • • in American Samoa are the customs of the Samoan people. • • • the first man who went there as commandant took their customs and put their customs into law, and that is the system which very largely exists to-day" (id., pp. 48-49).

It was following the 1928 hearings that Congress adopted the joint resolution accepting cession of American Samoa and placing its administration in the hands of the President until such time as "Congress shall provide for the government" of American Samoa (45 Stat. 1253; 48 U.S.C. § 1661 (c)). The resolution also provided for the appointment of a Commission to recommend to Congress appropriate legislation for Samoa. The activities of that Commission and its recommendations are summarized in the testimony of one of its members, Representative Beedy of Maine, before the Insular Affairs Committee of the House in 1932.[9] Among other things, the Commission held open hearings in American Samoa over a period of some three weeks. Congressman Beedy was most enthusiastic over the Samoans, saying "without disparaging any other peoples in our insular possessions, I think they are as fine a race as any of the Nation's wards" (*1932 Hearings,* p. 13). Corroborating the earlier testimony of the Navy commandants, Congressman Beedy said:

> "I think these people are the happiest I have ever known. They live as near to the communistic theory as any people I ever contacted. There is no such thing as individual ownership of lands. Title to these lands comes on down through generations in the family.
>
> "The family group is presided over by a 'matai,' or chieftan. His word is law within the family group. He

9. *Hearings on H.R. 9698 Before the House Committee on Insular Affairs, 72d Cong., 1st Sess. (1932)* [hereinafter *"1932 Hearings"*], pp. 11 ff.

presides over a group ordinarily ranging from 30 to a hundred or more in numbers" (id., p. 14).

In summarizing the conclusions of the Commission, Congressman Beedy said,

> "Our whole thought has been • • • *to keep the hand of the white man out of their affairs* just as much as possible. I am not sure but what, in the eyes of the Ruler of Nations, they have devised a finer system of living than many so-called great nations" (id., p. 18).

While the Commission did recommend an Organic Act be passed by Congress, about the only effect of the Act would have been to transfer administration of Samoa from the Navy to a Governor to be appointed by the President with the consent of the Senate. Senator Bingham, testifying after Congressman Beedy, stated:

> "At the present time, as you know, their rights are what has been granted them by the Navy Department. The Navy Department has been a benevolent, a very 'benevolent despot.' I use the word 'despot' in its technical sense rather than in any sense of criticism. But under the laws and regulations which have been established there under the authority given by the President to the Secretary of the Navy, the governor, a naval officer, is the executive, the legislative, and the judicial branch. He makes the laws. He can repeal the laws. He can make a new law to-day, promulgate it to-morrow, and try a man under it the next day" (id., p. 26).

In response to a direct question as to what the effect of the proposed Organic Act would be on American Samoa, Senator Bingham said,

> "In the first place, the bills that are before you contain a bill of rights which assures the people of Samoa practically the same rights that our own people are assured. There is a little difference, because they are

> not accustomed to some of our customs and *we tried to draft that in such a way as not to infringe upon or break down any of the native customs* and at the same time protect them against any tyranny or any despotism" (id., p. 27).

Nevertheless, the Organic Act drafted and recommended by the Commission did not pass the 71st Congress. Moreover, it was reintroduced and failed to pass in the 72nd, in the 73rd, in the 74th, and in the 75th Congresses—primarily because of the fear of many that the Organic Act, no matter how carefully drafted, would undermine and ultimately destroy the Samoan tribal system (*1932 Hearings*, pp. 22, 42-46).

Not until 1949 was consideration again given by Congress to the desirability of Organic Act status for Samoa. Once more a Committee was appointed to go to Samoa to ascertain the desires of the natives, and once more it was recommended to Congress that "the time has come to enact organic legislation establishing civil government for • • • American Samoa."[10] Even so, the Committee reported that Samoans favored an Organic Act only under certain conditions. For example, Samoans did *not* want an Act which prevented "involuntary servitude" because it would "destroy an integral part of the matai system" (*1950 Samoan Report*, p. 7). Even more startling, the Committee recommended acceptance of the condition, saying:

> "[The committee] regards the matai system as undemocratic and inconsistent with American principles, but at the same time it recognizes the upheaval that would follow if so ancient and strongly rooted a tradition were legislated out of existence" (id., p. 7).

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10. *Report to Public Lands Committee on the Pacific Islands, 81st Cong., 2d Sess. (1950)* [hereinafter *"1950 Samoan Report"*], p. 2.

As to the strenuous Samoan objection to universal suffrage, the Committee concluded:

> "The committee believes that the secret ballot and universal suffrage should *ultimately* be extended to American Samoa, but that this *should not be done immediately,* because the representatives of the fono who met with the committee fear that the matai and land-holding system would thereby be destroyed" (id., p. 10).

These and the other objections added up to one thing: The Samoans did not want an Organic Act because they did not want the consequences of an Organic Act. In the words of Governor Lowe of American Samoa in 1954:

> "In weighing the advantages of organic legislation against the disadvantages, it has become clear that *most Samoans are not in favor of* immediate action along this line. At least most of the leaders feel that *such legislation should be postponed for some years to come* or until the Samoan people are better trained to handle the problems which are likely to arise from it."[11]

While the President transferred administration of American Samoa from the Navy Department to the Department of the Interior in 1951, there was no change in basic policy. At the time of the changeover, President Truman wrote:

> "In particular, I want the people of Samoa to have my personal assurance that *their traditional rights and lands will be protected* while, with their help, the civilian administration finds ways to promote their political, economic, and educational advancement" (*Darden,* p. 20).

This assurance was reflected in Interior's official policy:

> "Protection of Samoans against the loss of their fam-

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11. *Special Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., Report on American Samoa Pursuant to H.Res. 89* (Comm. Print No. 4, 1954) [hereinafter *"1954 Samoan Report"*], p. 6.

> ily lands is an important policy not only as regards the economy, but also as it may affect the Samoan 'matai' system. It is the policy to maintain this protection. • • • It is the policy *to respect the Samoans' desire to protect the matai system* and to consult fully with the Samoans, through their legally constituted representative, on *any question which may affect the preservation or destruction of the system*" (*1961 Study Mission Report,* pp. 3-4).

Since Governor Lowe's wise recommendations, the Congress has not further questioned the Samoans' desire to remain an unorganized possession of the United States, but the Interior Department has, instead, extended the Samoans a greater voice in their own government for which they had long been asking. It was Governor Lowe who obtained from the Department of the Interior, in 1954, authorization to have a constitution drafted for American Samoa. The resulting document was largely a product of Samoan efforts and became effective upon the approval of the Governor and the Secretary of the Interior in 1960.[12] At the outset of that document (Art. I, § 3), it is provided as a part of the Bill of Rights:

> "Sec. 3. *Policy protective legislation:* It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands *and the destruction of the Samoan way of life* and language, contrary to their best interests. Such legislation as may be necessary may be enacted to *protect the lands, customs, culture and traditional*

12. As noted above, page 8, the *1961 Study Mission Report* points out that the "American Samoa constitution is but an administrative order, subject to the will of the Executive in Washington" with all of the "executive, judicial, and legislative power • • • concentrated in the Secretary of the Interior" (p. 5). The existence of the Constitution has nevertheless satisfied the Samoans and, as noted below, has probably solidified Samoan opinion against having Congress pass an Organic Act.

Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein, shall be effective unless the same be approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor."[13]

The complete acquiescence of Congress in the desires of the American Samoans was reflected in the *1961 Study Mission Report* (p. 6):

> "There remains, then, the not-easy-to-answer question of what form of government shall the Eastern Samoan people have in the American system. Clearly, *we do not want to impose forms or ideas we have evolved* for ourselves *on this gentle, comparatively unsophisticated group of Polynesians against their wishes.* Nor do we want to support an elaborate, complex governmental bureaucracy for the 20,000 inhabitants of those beautiful, but resource-lacking, islands in the South Seas."

It concluded (p. 9):

> "When [the Samoan] constitution has been tested by practice and time, and the Samoans have had an opportunity to live under it and then review it, the Congress of the United States should consider embodying its provisions into an Organic Act for American Samoa. Until that time, however, your subcommittee believes that flexibility and ease of change is highly desirable during this transitional period."

In its summary of recommendations, the *Report* stated (p. 15):

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13. The identical provision is Section 3 of Article I of the Revised Constitution of American Samoa which became effective on July 1, 1967, and is in force today.

> "As to U.S. citizenship and organic legislation, the people of American Samoa should be encouraged and aided in every way possible to *consider*, with legal and factual knowledge readily available to them, *just what they really want*, and to *make their decisions known to Congress* through an islandswide plebiscite."

In accordance with this last suggestion, the Samoan legislature (Fono) created the Future Political Status Study Commission for American Samoa in 1969, and directed the Commission to:

> "(1)' . . . study alternative forms of future political status open to American Samoa and * * * assess the advantages and disadvantages of each';
> "(2)' . . . study and appraise the history, the development and present status of political units comparable or relevant to American Samoa, both within and outside the jurisdiction of the United States'; and
> "(3)' . . . present a complete report of its findings and recommendations to the Second Regular Session of the Eleventh Legislature'" (*Political Status Report*, pp. 1-2).

The report (which we have attached hereto as Appendix A and have been referring to as the "*Political Status Report*") was presented on February 9, 1970. The Samoans once more, as they have time and again since 1900, concluded that they do not want an Organic Act, that they prefer to retain the status of an "unorganized possession" of the United States rather than become a "Territory" thereof. The reason for their conclusion remains the same: Passage of an Organic Act will mean the applicability of United States law and the United States Constitution and this eventuality, the Samoans fear, will "probably be the death

knell for Samoan custom" (*Political Status Report*, p. 7).

Congress presumably will again honor these most recently expressed desires of the Samoans and will forego passage of an Organic Act in the interest of preserving the native tribal life and the Matai system in American Samoa.

4. THE ECONOMY OF AMERICAN SAMOA IS PRIMITIVE, IS NONCOMPETITIVE AND IS COMPLETELY REGULATED BY THE GOVERNOR; THE PLAINLY EXPRESSED INTENTION OF CONGRESS THAT THE COMPLEX PROVISIONS OF THE SHERMAN ACT SHOULD NOT APPLY TO THE RUDIMENTARY ECONOMICS OF SUCH TRIBAL LIFE IS CLEARLY UNDERSTANDABLE.

In reversing the District Court *per curiam*, this Court said that "[w]e discern no reason, and appellee suggests none, why Congress would have wished to exclude unorganized territories from the coverage of Sec. 3." Had this Court set the case down for argument, it would have heard an elaboration of the many reasons enumerated by Congress to which we briefly referred in the motion to affirm. Also, had the Court referred to the record in the District Court, which was cited in the motion to affirm (p. 7) and which is on file with this Court, it would have seen the careful documentation of all these reasons which were before the District Court but which were not articulated in the lower Court's decision.

From a practical standpoint, Samoa has had no "business life," no "economic system" as we Americans think of it. The following is typical of the descriptions found in the various Congressional reports and studies:

> "There are no valuable natural resources in American Samoa. So far as is known, there is no mineral wealth or oil. * * * There is no opportunity for Americans to become planters in these islands, because of lack of available lands. Fortunately for the Samoans themselves, there is nothing in American Samoa to excite the cupidity or greed of capital" (*S.Rept. 500 To Accompany S. 1574 (Samoan Organic Act), Committee*

on Territories and Insular Affairs, 73d Cong., 2d Sess. (1934), p. 2).

Another Congressman observed:

> "As I say, there are no natural resources in these islands, fortunately for the people, that can ever attract outside nations. No oil, no iron. The copra, the dried meat of the coconut, is the sole commercial crop of these islands. * * * It is brought in and weighed and the copra crop is sold to the highest bidder under one contract. The proceeds are prorated and checks go to the matais, chief of the families. The property is in the family. The matai manages the family funds and divides them to meet the family needs" (*1932 Hearings*, pp. 16-17).

As late as 1961, a Congressional Committee pointed out:

> "The present economy of American Samoa, with its limited land resources, provides little other than a bare subsistence for most of the rapidly increasing native population" (*1961 Study Mission Report*, p. 19).

The tribal life is a happy life for the natives and nature has provided them with all that is needed. Congressman Beedy enthused:

> "* * * I can understand why [Robert Louis] Stevenson came to enjoy this life in Samoa. They live! They do not need the artificial pleasures that so-called civilized peoples need to be happy. Singing and dancing in the open and within the circle of the family fales, a malanga (or journey by the group) to the next village where they are received with open arms and fed ungrudgingly until the food supply of the village is exhausted, these, together with their church activities, constitute their pleasure.
>
> "When the village needs more food it is supplied by the breadfruit, banana, and coconut trees. Nature supplies these foods. Breadfruit grows without cultiva-

> tion; the coconut grows without cultivation, though now they improve their product somewhat, while bananas grow wild. The fish in the sea, the crustaceans on the reefs, and the taro and yam which are cultivated, together with domestic swine and fowl, comprise the main food supply" (*1932 Hearings,* pp. 17-18).

Congressman Williams, at the same hearing, pointed out:

> "This country tried to introduce our vegetables over there. They will not have them. It is too much work to grow them" (*1932 Hearings,* p. 18).

This is the life that the Samoans want to continue living just as they have been for thousands of years and, as we have seen, the United States has done everything necessary to preserve it for them. "Samoa for Samoans" has been our policy for the entire 70 years that we have controlled the islands. All concerned Samoans and Americans knew that this policy could be effectuated only by keeping out business — by refusing to "Americanize" the natives and the economy. From the outset, the Navy "discouraged the immigration of traders and alien merchants and • • • endeavored to limit the licenses issued to new enterprises owned by non-Samoans." This policy "of protecting the economic interests of the Samoans against outside exploitation and the establishment of additional enterprises has received the full support of the Samoan people" (*Darden,* p. 21).

Various laws have been designed for the very purpose of keeping out, or rigorously controlling, the entry of American capital and American business (as well as foreign capital and business). In the first place, over 98 per cent of all Samoan land is communally owned by the tribes and is under the control of the Matai. It cannot be sold to a non-Samoan and it can be leased only with approval of the Governor. We quoted above (pp. 16-17) the constitutional

provision preventing alienation of land. The Revised Code of American Samoa (1961) carries out the mandate of the Constitution and provides, among other things, that no lease of Samoan land shall be valid "without the written approval of the Governor" and that such approval will not be given if the lease "is not in the best interests of the public or is incompatible with the *economic and social development* plans for the territory" (Code Amer. Samoa § 9.0101 (1961)). The desirability of the law and its objectives were confirmed in the *1961 Study Mission Report* (p. 90):

> "As the law stands, the Governor of American Samoa is given a great deal of power with respect to leases of land to persons other than Samoans of at least one-half or more Samoan blood. Thus, the development of industry and business involving the use of native land by outside capital will depend heavily on the attitude of the local government and its willingness to cooperate in meeting investors' requirements."

Governmental control over the economy of American Samoa is by no means limited to land leases and sales. The Code provides that even a Samoan company cannot "be formed or do business without prior approval of the Governor" (§ 11.0103). And after formation, the Certificate of Incorporation "may be regulated, cancelled, withheld or [made] subject to conditions imposed upon the enjoyment thereof, whenever the Governor *shall deem it necessary for the public good*" (§ 11.0105(3)).

As for foreign corporations (defined to include American companies), the Code provides that they shall not "transact any business in American Samoa without first procuring a permit from the Governor to do so" (§ 11.0123(1)). Moreover, the permit "shall state specifically the business which the corporation may transact in American Samoa, and it shall transact no other business in American Samoa than

that so specified therein" (ibid.). Again, the Governor is given the power to cancel, regulate or condition an issued permit "whenever he shall deem it *necessary for the public good*" (ibid.). The only "appeal" from action by the Governor in refusing, regulating or conditioning business permits is to the Secretary of the Interior, and it is specifically provided that on such appeals "decisions as to matters of fact by the Governor shall be conclusive, unless clearly erroneous" (§ 11.0126).

The regulatory power similarly extends to immigration. The Code provides that "No person [and this includes American citizens] shall enter American Samoa without first having obtained permission to do so" (§ 24.0101). The only persons exempt from this requirement are crews of vessels or aircraft, permanent residents of American Samoa, employees of the Government of American Samoa, and persons visiting American Samoa as tourists "who intend to remain in American Samoa for less than 30 days *and who do not intend to engage in any commercial activities*" (§ 24.0106). A special permit is required for anyone who wishes to remain for more than 30 days and an application therefor must state the "*occupation or business* in which he intends to engage" (§ 24.0104(2)). Among the reasons specified for refusing entry to a person is the following:

> "Seeking to enter American Samoa *for the purpose of performing skilled or unskilled labor*, if the Governor has determined and certified to the Attorney General that sufficient workers in American Samoa who are able, willing and qualified are available at the time in American Samoa to perform such skilled or unskilled labor and the employment of such person will adversely affect the wages and working conditions of the workers in American Samoa" (§ 24.0117(17)).

The complete control which the Governor exercises over the economy of American Samoa was confirmed by ex-Governor H. Rex Lee in his deposition in this proceeding.[14] He described at length his powers under the various Code provisions described above and stated, by way of summary, that his "whole goal in planning to develop the islands, was to develop them for Samoans, to keep Samoans in charge not only of their day to day operations, their government, but also *in charge of their economic setup*" (Lee Dep., pp. 22-23). Whether he would permit a "foreigner" (*including Americans*) to come into American Samoa and establish a particular business would depend upon whether it was the type of business that a Samoan could handle. If it was, Governor Lee testified, the application of the "foreigner" would probably be denied. In every instance before a new business could be started, it would be looked at "in terms of what [it] was going to do for the territory and whether that development • • • could be handled by Samoans" (Lee Dep., p. 99; see also, Lee Dep., pp. 21-22).

In point of fact, there is only the most rudimentary business life in American Samoa, because that is the only form that fits with the Matai system. The various service functions are performed by the Government itself.[15] In sum, the business life of American Samoa is simple, it is primitive, and it is controlled in its entirety and in its detail by one person—the Governor. There is no reasonable ground for arguing against the clear fact that Congress

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14. The deposition of H. Rex Lee was on file with the District Court at the time it decided the motion to dismiss for lack of jurisdiction, and was brought to the attention of the court in the supporting Memorandum of defendant Standard (p. 22). The plaintiff did not dispute the statements made by Governor Lee.

15. The Government owns and operates the radio station, the television station, the power plant, the telephone system, the medical facilities, the water system, the sewage system and, until very recently, the bank (see Lee Dep., pp. 42, 43, 45, 79 and 190).

does not want the Sherman Act to be applicable under these circumstances. Moreover, there is no logical basis for urging that Congress should change its mind and make the Act applicable there.

The Sherman Act has for its sole purpose the prevention of restraints on free competition in the market place. In American Samoa it is not the free forces of competition but the decision of the Governor that controls what businesses may be started, by whom and [redacted] what terms and conditions. Indeed, the 1970 P[redacted]ical Status Study Commission concluded that Samoa should continue as an "unorganized possession" because the Commission knew that if the laws of the United States were made applicable in American Samoa "any person could • • • *compete in business with Samoans*" and this competition they did not want (*Political Status Report*, p. 24). The same fear of competition was expressed by the Commission when it pointed out that "Many Samoans are *not completely ready to compete.* Samoan businesses may be engulfed by large-scale Hawaii enterprise" (*Political Status Report*, p. 28). It found it "difficult to fault an expanded economy" but concluded that "expansion at the expense of the Samoan people, similar to the subjugation in Hawaii of the Hawaiians, is hardly desirable" (*Political Status Report*, p. 17).

For the Samoans to say that they fear and do not want competition is to say that they do not want or need the Sherman Act. That Act's only reason for being is to promote and foster competition. The fact that free competitive forces are not permitted in the Samoan market place (with the full concurrence and support of Congress) is conclusive evidence not only that the Sherman Act is not wanted and not necessary but that it positively does not apply.

We turn now to the authorities.

B. When Congress Makes a Statute Like the Sherman Act Applicable to "Territories," It Extends Only to Organized Possessions (i.e., Those With Organic Acts), and American Samoa Is Not an Organized Possession.

1. A "TERRITORY" IS A POSSESSION FOR WHICH CONGRESS HAS PROVIDED AN ORGANIC ACT.

a. Congress Has Long Distinguished "Territories" from Other Possessions, Particularly in Defining the Applicability of a Statute.

It will be remembered that in our motion to affirm (pp. 9-12), we made reference to, and quoted from, a list of statutes in which a differentiation between "Territories" and other land areas over which it had jurisdiction was made by Congress. Yet in its *per curiam* reversal, this Court did not mention any of these statutes or attempt to distinguish them from Section 3 of the Sherman Act. It may be that they were not brought to the Court's attention.

Long before the Sherman Act, Congress was drawing a clear distinction between "Territories" and other land areas over which it had jurisdiction. The latter are variously referred to as "land areas," "country," "possessions," "unorganized territories," etc. Perhaps the earliest and clearest examples of Congressional expression are found in the early Organic Acts themselves. Thus, in the Organic Act of Wisconsin (Act of April 20, 1836; 5 Stat. 10), Congress provided:

> "* * * [t]hat from and after the third day of July next, the *country* included within the following boundaries shall constitute a *separate Territory*, for the purposes of temporary government, by the name of Wisconsin; that is to say * * *."

The same distinction of "Territories" is found in the Organic Acts of Utah (Act of September 9, 1850; 9 Stat. 453; R.S. § 1897); Colorado (Act of February 28, 1861; 12 Stat. 172; R.S. § 1899); Dakota (Act of March 2,

1861; 12 Stat. 239; R.S. § 1900); Idaho (Act of March 3, 1863; 12 Stat. 808; R.S. § 1902); and Montana (Act of May 26, 1864; 13 Stat. 85; R.S. § 1903).

The distinction between organized Territories and other places within the jurisdiction of the United States appears in numerous Congressional statutes spanning the entire course of our history. For example:

(1) *Polygamy Statute* (1882):

"No polygamist, bigamist, or any person cohabiting with more than one woman • • • *in any Territory or other place over which the United States has exclusive jurisdiction,* shall be entitled to vote at any election held *in any such Territory, or other place,* or be • • • entitled to hold any office • • • in, under, or for any such Territory or place, or under the United States" (Act of March 22, 1882; 22 Stat. 31; 48 U.S.C. § 1461).

(2) *Proof of Public Records Statute* (1872):

"All records • • • which may be kept in any public office of *any* • • • *Territory, or of any country subject to the jurisdiction of the United States,* • • • shall be proved or admitted in any court or office in any other • • • *Territory, or in any such country,* by the attestation of the keeper of the said records • • •" (R.S. § 906; repealed 62 Stat. 993; a similar provision now appears in the Judicial Code of 1948, 28 U.S.C. § 1739).

(3) *Carnal Knowledge Statute* (1889):

"• • • every person who shall carnally and unlawfully know any female under the age of sixteen years • • • in the District of Columbia *or other place, except the territories,* over which the United States has exclusive jurisdiction; or on any vessel • • • out of the jurisdiction of *any State or Territory* • • • shall be guilty of a felony • • •" (Act of February 9, 1889; 25 Stat. 658).

(4) *Federal Food and Drug Act* (1906):

"• • • any article of food, drug, or liquor that is adulterated or misbranded • • • and is being *transported from one State, Territory, District, or insular possession to another* for sale • • •" (Act of June 30, 1906, § 10; 34 Stat. 771; repealed by Act of June 25, 1938, 52 Stat. 1059; similar provisions now appear at 21 U.S.C. §§ 301, 332, 334, 337).

(5) *Shipping Act of 1916:*

"• • • term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas • • • from port to port *between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession* • • • *or between places in the same Territory, District, or possession*" (Act of September 7, 1916, § 1; 39 Stat. 728; 46 U.S.C. § 801).

(6) *Packers and Stockyard Act of 1921:*

"• • • term 'commerce' means commerce *between any State, Territory or possession,* or the District of Columbia, and any place outside thereof; • • • *or within any Territory or possession,* or the District of Columbia • • •" (Act of August 15, 1921, § 2(a)(6); 42 Stat. 159; 7 U.S.C. § 182(6)).

(7) *Motor Carrier Act of 1935:*

"• • • term 'foreign commerce' means commerce • • • *between any place in the United States and any place in a Territory or possession* of the United States • • •" (Act of August 9, 1935, § 203(a)(11)(B); 49 Stat. 544, as amended, Act of September 1, 1950, § 1(b); 64 Stat. 574; 49 U.S.C. § 303(a)(11)(B)).

(8) *Federal "Anti-Racketeering" Act* (1951):

"• • • term 'commerce' means commerce within the District of Columbia, or any *Territory or posses-*

sion • • • all commerce *between any point in a State, Territory, Possession,* or the District of Columbia *and any point outside thereof* • • •" (18 U.S.C. § 1951(b)(3); derived from Act of June 18, 1934; 48 Stat. 979).

It is equally important to note that when Congress has intended the term "territory" in a statute to mean something other than an *organized* territory, it has so stated. For example, the Wool Products Labeling Act provides: "the term 'Territory' includes the insular possessions of the United States, and also any Territory of the United States" (Act of October 14, 1940, § 2(i); 54 Stat. 1129; 15 U.S.C. § 68(i)). Here, once again, Congress expressly recognized the historical distinction it has always made between "Territory" and the other possessions over which it has jurisdiction.

When Congress wants to include an unorganized area such as American Samoa in a statute, it does not use the term "territory" but rather spells out its intent. For example:

(1) *Fair Labor Standards Act of 1938:*

"• • • 'State' means any State • • • or the District of Columbia or any Territory *or possession* of the United States" (52 Stat. 1060; 29 U.S.C. § 203(c)).

(2) *Social Security Act* (1939):

"• • • 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and *American Samoa*" (64 Stat. 500, as amended; 42 U.S.C. § 410(h)).

(3) *School Lunch Act* (1946):

"• • • 'State' means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or *American Sa-*

moa" (60 Stat. 233, as amended; 42 U.S.C. § 1760 (d)(1)).

(4) *Public Library Act* (1956):

"The term 'State' means a State, the District of Columbia, Puerto Rico, Guam, *American Samoa*, the Trust Territory of the Pacific Islands, or the Virgin Islands" (70 Stat. 296; 20 U.S.C. § 358(a)).

(5) *Hospital Construction Act* (1964):

"• • • 'State' includes the Commonwealth of Puerto Rico, Guam, *American Samoa*, the Virgin Islands, and the District of Columbia" (78 Stat. 460, as amended; 42 U.S.C. § 291*o*(a)).

Unless the words of Congress are to be disregarded as evidence of its intent, the term "Territory" as used in Section 3 of the Sherman Act and in other statutes enacted by Congress has a specific meaning—to wit, a land area organized under an Organic Act. The term "Territory" is not intended by Congress to include unorganized land areas, such as American Samoa. This distinction (as shown above) has an historic, as well as a political basis.

b. The Courts Have Consistently Recognized the Distinction Which Congress Has Made Between "Territories" and Other Possessions and Have Held That the Distinguishing Feature Is That a "Territory" Is "Organized" by Virtue of an Organic Act.

In reversing the District Court, the *per curiam* opinion of this Court cites not one instance in which a statute made applicable to "Territories" has been held to extend to unorganized areas. We have been unable to find any.[16] To the

16. We assume the Solicitor General could find none. His Jurisdictional Statement did not cite any case in which a statute made applicable to "Territories" had been held to extend to unorganized areas. The Jurisdictional Statement, it will be remembered (page 2, above), states: "[t]here was no issue in *Shell* whether Section 3 applies to unorganized territories, and the Court had no occasion to consider, let alone decide, that question."

contrary, every authority of which we are aware has held that such statutes extend only to *organized* areas and not to unorganized possessions. We referred to these dispositive precedents in our motion to affirm (pp. 15-20). Two of the cases merit further discussion.

The Carnal Knowledge Statute quoted above was before this Court in *In Re Lane* (1890) 135 U.S. 443. By its terms, the law was applicable in areas under the jurisdiction of the United States "except the territories." The issue was whether petitioner, who was alleged to have committed the offense charged in that part of the Indian Territory then known as Oklahoma, *which had no Organic Act,* could claim that this was a "territory" within the exception. The Court said no. It held:

> "• • • the words 'except the territories' have reference exclusively to that system of *organized* government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system. *They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress; and their legislative acts are subject to the disapproval of the Congress of the United States.* • • • *they exercise nearly all the powers of government under what are generally called organic acts passed by Congress* conferring such powers on them. It is this class of governments, *long known by the name of Territories,* that the act of Congress exempts from the operation of this statute • • •" (*In Re Lane* (1890) 135 U.S. 443, 447).

Significantly, *In Re Lane,* holding that the term "Territories" means "organized Territories," was decided April 28, 1890, just *two months before* passage of the Sherman Act (July 2, 1890). If Congress had intended the term "Ter-

ritories" in the Sherman Act to include unorganized possessions, it must be presumed that it would have said so.

This definition of "Territory" was not new to the *Lane* case, however. In *Ex Parte Morgan* (W.D.Ark. 1883) 20 Fed. 298, the issue was whether the Chief of the Cherokee Nation, an area under a local Indian government, was the executive authority of a "State or Territory" within the meaning of the Extradition Statute (R.S. § 5278). The court held that he was not. It said:

> "A territory, under the constitution and laws of the United States, is an inchoate state,—a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, *but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States*" (20 Fed. 298, 305).

This is the Congressional definition of a "Territory" recognized and effectuated time and again by this Court (see, e.g., *Geofroy v. Riggs* (1890) 133 U.S. 258, 268; *Kopel v. Bingham* (1909) 211 U.S. 468, 475), and by the lower courts (e.g., *David Cabrera, Inc. v. Union de Choferes y Duenos* (D.Puerto Rico 1966) 256 F.Supp. 839, 842). We discuss *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, which concerns Section 3 of the Sherman Act, below.

c. Congress Has Clearly Stated, and This Court Has Specifically Agreed, That Section 3 of the Sherman Act Applies Only to Possessions That Have Been Organized by an Organic Act, i.e., It Applies Only to "Territories" as They Have Been Consistently Defined.

Section 3 of the Sherman Act applies by its terms to commerce:

> "* * * in any *Territory* of the United States or of the District of Columbia * * * or commerce between

> any such *Territory* and any *State* or *States* or the *District of Columbia,* or with *foreign nations,* or between the District of Columbia and any State or States or foreign nations * * *" (15 U.S.C. § 3).

That Congress intended to use the term "Territories" in Section 3 to mean only *organized* territories or possessions is clear from what it did some years later in the Clayton Act (Act of October 15, 1914; 38 Stat. 730) and in the Federal Trade Commission Act (Act of September 26, 1914; 38 Stat. 717), both of which are supplemental antitrust laws.

In the Clayton Act, the provisions were made applicable not only to commerce in and between "Territories" but also between "Territories" and "insular possessions or other places under the jurisdiction of the United States." Section 1 provides in relevant part:

> "'Commerce,' as used herein, means trade or commerce among the several States * * * or between the District of Columbia or *any Territory of the United States* and any State * * * *or between any insular possessions or other places under the jurisdiction of the United States,* or between *any such possession or place and any State or Territory of the United States* * * *" (15 U.S.C. § 12).

In the Clayton Act, as in so many of the other statutes which we have quoted above, Congress distinguished "Territories" from "other possessions" of the United States and made the Act applicable to both. That Congress knew that the Sherman Act applied only to Territories and that it was intentionally expanding the scope of the Clayton Act to include unorganized possessions is specifically spelled out in the House Committee report. It states:

> "Section 1 of the bill [i.e., Clayton Act] defines technically for purposes of this bill certain words, phrases,

and terms used in the body of the bill. * * * The definition of commerce * * * is broadened *so as to include trade and commerce between any insular possessions or other places* under the jurisdiction of the United States, *which at present do not come within the scope of the Sherman antitrust law* * * *. The act approved July 2, 1890, and commonly referred to as the Sherman law* * * * [is] *restricted in application to commerce among the several States and Territories, the District of Columbia, and with foreign nations*" (H. Rept. 637, 63d Cong., 2d Sess. (1914), pp. 7-8).

The Federal Trade Commission Act, which accompanied the Clayton Act through Congress, was specifically and intentionally limited in its application to the same commerce covered by the Sherman Act. Section 4 of the Federal Trade Commission Act provides:

> "'Commerce' means commerce among the several States * * * *or in any Territory of the United States* or in the District of Columbia, or *between any such Territory and another, or between any such Territory* and any State * * * or between the District of Columbia and any State or *Territory* or foreign nation" (15 U.S.C. § 44).

In the course of the House debates, a manager of the bill was asked why the law was to be inapplicable to "commerce with any possessions of the United States" as distinguished from "Territories." The manager's reply was:

> "The reason was that we did not think that the scope of the commission should be extended that far, to embrace our foreign *possessions.* That *conditions there are so different than here that they could be handled by local authorities better than by a commission 7,000 miles away in the city of Washington.* If the scope of the commission needs to be extended hereafter

to any of them, it can be done, but at present *we thought it would hamper rather than to help business there and here"* (51 Cong.Rec. (1914) 14935).

There can be no doubt, we submit, that Congress well knows that Section 3 of the Sherman Act, like the Federal Trade Commission Act, does *not* apply to unorganized possessions. It is equally clear that Congress has *intentionally* left the Sherman Act inapplicable to unorganized possessions—probably for the very reasons given by the manager of the Federal Trade Commission Act. From our review of the tribal life in Samoa and its paternalistic protection by Congress, it is obvious that any attempt to impose the Sherman Act strictures on their primitive "economy" would border on the ridiculous.[17]

While only two discovered cases have passed on the point, both agree that Congress used the term "Territory" in the antitrust laws in its political sense—to mean an "organized" possession.

In *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, this Court was called upon to decide whether Section 3 of the Sherman Act applied to Puerto Rico. The issue before the Court, however, was *not* whether Section 3 applied to unorganized areas such as American Samoa. Puerto Rico was fully organized. Congress had adopted an Organic Act for the island in 1900, after its cession from Spain (Foraker Act; 31 Stat. 77), and had passed a revised Organic Act for the island in 1917 (Organic Act of March 2, 1917; 39 Stat. 951). The question for decision was whether Section 3 of the Sherman Act applied to *all organized* areas or *only to those organized areas* which were also *"incorporated."*[18] Defendant Shell contended for the latter construc-

17. See discussion above, pp. 10-26.

18. An *"incorporated"* Territory is one to which all of the guarantees of the Federal Constitution extend (*Downes v. Bidwell*

tion because Puerto Rico was admittedly "unincorporated" even though organized. This Court rejected Shell's position and held that Section 3 extended to *all* organized areas—i.e., "Territories"—whether incorporated or not.

In the course of its opinion, the Court properly pointed out that it was immaterial that Puerto Rico was not a dependency of the United States at the time Section 3 was enacted. The test, it held, was whether Puerto Rico had an Organic Act at the time of the alleged violations. To quote the Court:

> "When the Sherman Act was passed (1890), we had no insular dependencies [see footnote 19, below] and, necessarily, the application of § 3 did not extend beyond our continental domain; and, undoubtedly, it was this domain which was in the immediate contemplation of Congress. * * * *The only question, therefore, is whether the word 'territory,' as used in § 3 of the Sherman Act, properly can be applied to a dependency now bearing the relation to the United States* which is borne by Puerto Rico" (302 U.S. 253, 257).

(1901) 182 U.S. 244, 299 (White, J., concurring)). An "unincorporated" Territory is one to which only a part of the constitutional guarantees extend, the remainder (if any) being defined in a statutory bill of rights included in an Organic Act (see, e.g., Organic Act of Guam, Aug. 1, 1950; 64 Stat. 384, as amended; 48 U.S.C. §§ 1421, et seq.). Under its power to regulate "the Territory or other property of the United States" (U.S.Const., Art. IV, § 3, cl. 2), Congress determines whether a Territory will be incorporated or unincorporated.

19. In stating that at the time the Sherman Act was passed this country had no insular dependencies, the Court was factually incorrect. Our motion to affirm (fn. 9, pp. 17-18) points out that the United States had a number of insular dependencies at that time. Thus, the distinction between "Territories," as organized land areas, and unorganized insular possessions was clearly before Congress and was reflected in its determination to use the term "Territory" in Section 3, rather than other words such as "country," "land areas," or "possessions" (see pp. 39-40, infra).

As to what Congress meant by "Territory" in the Sherman Act, the Court referred to its earlier decision in *Kopel v. Bingham* (1909) 211 U.S. 468, where it defined "territory" under the Extradition Act (R.S. §§ 5278, 5279) to include Puerto Rico:[20]

> "• • • we held in *Kopel v. Bingham*, 211 U.S. 468, 474, 475, 476, that Puerto Rico was a 'territory' within the meaning of § 5278 of the Revised Statutes, which provides for the demand and surrender of fugitive criminals by governors of territories as well as of states. • • • The word 'territory' as used in that statute was defined as meaning 'a portion of the country not included within the limits of any State, and not yet admitted as a State into the Union; *but organized under the laws of Congress* with a *separate legislature* under a territorial *governor and other officers appointed by the President and Senate* of the United States.' And the court concluded, 'It may be justly asserted that *Puerto Rico is a completely organized Territory* • • •.'
>
> "With equal force, it may be said here that there is no reason why Puerto Rico should not be held to be a 'territory' within the meaning of § 3 of the Sherman Act" (302 U.S. 258-259).

In elaboration, the Court went on:

> "If • • • Congress intended by the Sherman Act to exert all the power it possessed in respect of the subject matter—trade and commerce—, it is equally reasonable to conclude that Congress intended to include all *territories* to which its powers might extend. • • • we hold, accordingly, that the word 'territory' was used in its most comprehensive sense, as embracing *all organized territories*, whether incorporated into the United States or not, including Puerto Rico" (302 U.S. 259).

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20. Comparable provisions are now codified at 18 U.S.C. §§ 3182, 3194.

Thus, the holding of the Court was that Section 3 of the Sherman Act extends to all *organized* areas (i.e., Territories) and is not limited to those which are also "incorporated." It did not decide, because it was not called upon to do so, whether Section 3 would extend beyond "organized" territories to include the unorganized areas. But the Court cited, relied upon, and therefore again confirmed the accepted principle that when Congress makes a statute applicable to "Territories" it means to include *only those areas organized by an Organic Act,* thus excluding unorganized possessions under its jurisdiction.

The other case, *David Cabrera, Inc. v. Union de Choferes y Duenos* (D. Puerto Rico 1966) 256 F.Supp. 839, dealt with the term "Territory" as it appears in the Clayton Act. As we pointed out above (pp. 33-35), the Congressional proceedings reflect that the word "Territory" in the Clayton Act means just what it means in the Sherman Act, although in Clayton Congress intentionally went further than it did in Sherman and specifically included "insular possessions, or other places under the jurisdiction of the United States." The Court in *Cabrera* held that "Territory" referred to an area in a political sense (i.e., as organized), rather than as synonymous with "place" or "area" in the geographic sense. From the face of the Clayton Act itself the Court found:

> "It is obvious from 15 U.S.C.A. § 12 [Clayton Act, § 1; 38 Stat. 730] that Congress is not using the term 'territory' in its broad meaning. *Its use, together* with the use within the same statute of the terms 'State', 'District of Columbia', 'foreign nation', 'insular possession' and 'place under the jurisdiction of the United States', indicates the *intent of Congress to be precise in the terminology* used in this statute. *The clear intent was to refer to territory in its political sense* • • •" (256 F.Supp. 829, 842).

d. The Per Curiam Opinion in This Case Takes No Cognizance of the Legislative History and of the Precedents Which Establish Conclusively and Without Exception That When Congress Uses the Term "Territories" in a Statute, Including Specifically Section 3 of the Sherman Act, It Does Not Intend to Include Unorganized Land Areas or Other Possessions Which Do Not Have an Organic Act.

The *per curiam* opinion omits reference to the dispositive legislative history and precedents discussed above which were mentioned, albeit briefly (pp. 8-20), in the motion to affirm. Nor, if this Court disagrees with or intends to overrule the long-standing treatment of the term "Territories" by Congress, does the *per curiam* explain why it rejects this legislative history and precedent.

The *per curiam* states that "Congress, *of course,* did not have Samoa in mind when it enacted the Sherman Act."[21] This begs the question. It is clear from prior usage, accepted by the courts, that by choosing the word "Territories" in Section 3 (pp. 26-32, supra), Congress intended to exclude all unorganized land areas under the control of the United States. These included *at that time* (1890) the guano islands, Midway Island, and Swain's Island (one of the Samoan Islands, acquired before 1875; 43 Stat. 1357). When the Samoan Islands (other than Swain's Island) were acquired in 1900, it was the obvious intent of Congress that they would not be subject to the Sherman Act because, like the other islands, they were unorganized insular possessions.

The various guano islands were acquired by the United States starting in 1856 (11 Stat. 119). Congress gave to the discoverers a monopoly in the commerce of these islands (11 Stat. 119; 48 U.S.C. §§ 1411, et seq.). If Congress had in-

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21. A copy of the *per curiam* opinion is set forth in Appendix B to this Petition for Rehearing.

tended to *include* unorganized land areas within the provisions of the Sherman Act, it would hardly have tolerated such monopolies to the discoverers. But no such intent was expressed by Congress in Section 3; instead Congress used the term it had traditionally used, i.e., "Territories," to exclude such unorganized possessions from Section 3.

The *per curiam* refers to *Puerto Rico v. Shell Co.* It quotes the statement in *Shell* that the Sherman Act should be held applicable to Puerto Rico, unless it appears that "[i]f the acquisition of *that* insular dependency [Puerto Rico] had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act.'" This quotation is not relevant to the instant case.

First, it is based upon a factual misstatement (not referred to by the *per curiam*) which immediately preceded the quoted sentence. The Court in *Shell* said that "[w]hen the Sherman Act was passed (1890), we had no insular dependencies" (302 U.S. 257). It then made the statement quoted in the *per curiam*. The basic statement, i.e., that there were no insular dependencies, was wrong. As noted above, at the time of the Sherman Act, we had a number of *unorganized* insular dependencies of which Congress was aware and which plainly did not come within the definition of "Territories."

Second, under the historic use of the term "Territories" in Federal statutes, Puerto Rico was excluded from the operation of Section 3 until it was organized by Congress. It received an Organic Act shortly after its acquisition by the United States (31 Stat. 158).

Third, Puerto Rico at the time of its acquisition by the United States had far different economic, political, and social conditions than American Samoa had in 1900, or has today. The United States acquired Puerto Rico in 1898, after the Spanish-American War. Puerto Rico was under

military government until 1900. In April, 1900, Congress provided an organic act for Puerto Rico, known as the Foraker Act (31 Stat. 158). In 1917, and again in 1947, Congress altered the Organic Act to provide broader powers of self-government for Puerto Rico (39 Stat. 951; 61 Stat. 770). In 1952, Puerto Rico was granted commonwealth status (Resolution of July 3, 1952; 66 Stat. 327).

When acquired by the United States, Puerto Rico already had a relatively well developed economy. In 1898, 20% of the island was under cultivation (*First Annual Report of the Governor of Puerto Rico to the President of the United States* (1900-1901), p. 38). The three principal crops were coffee, sugar and tobacco (ibid.). There were some 39,000 farms on the island, with an average size of 45 acres, (id., p. 41).

In 1897, exports from Puerto Rico were $18,574,678, and imports were $17,858,063 (id., p. 42). In 1937, at the time *Puerto Rico v. Shell Co.* was decided, Puerto Rico's exports were $114,954,000; imports were $98,860,000 (*Government of Puerto Rico, Department of Agriculture and Commerce, Annual Book of Statistics* (FY 1939-1940), p. 3).

In 1940, Puerto Rican gross income was $341,400,000. Of this, agriculture provided $106.7 million, manufacturing $40.4 million, services and trades $128 million, construction $3.1 million, and government and government enterprises $63.2 million (see generally, *Puerto Rico, A Survey of Historical, Economic and Political Affairs, 1959,* 86th Cong., 1st Sess. (1959), pp. 27ff).

In the period 1940-1968, Puerto Rico's gross product advanced 12.5% per year, while per capita income climbed from $266 to $1,129 (*Federal Maritime Commission, Puerto Rican-Virgin Islands Trade Study* (April 1970), p. 7). The gross domestic product increased $1,189% to $3.7 billion. In 1968, trade between the U.S. mainland and Puerto Rico amounted to $2.83 billion (id., p. 6).

Puerto Rico's population increased from approximately 950,000 in 1898, to 2.7 million in 1968 (id., pp. 7, 12). In 1968, the labor force was nearly 797,000 persons (id., p. 7).

Compare the foregoing with the total population of 28,000 persons in American Samoa, and with the simple primitive economy of those islands.

Because of the very different political, economic and social conditions, it is not surprising that Congress "organized" Puerto Rico by Organic Act, nor that this Court held the Sherman Act applicable to Puerto Rico in 1937. Unlike American Samoa, Puerto Rico at that time had social-political-economic status which in the opinion of Congress qualified it as a "Territory" as that term is used in the Sherman Act and other Federal statutes, and hence it had organized Puerto Rico with the result confirmed by this Court. When and if American Samoa reaches similar status, Congress presumably will enact an Organic Act for it, with all of the consequences above noted.

The *per curiam* quotes *Shell* for the proposition that "Congress intended by Sec. 3 to exert all the power it possessed in respect of the subject matter — trade and commerce." But this statement adds nothing to the analysis because under the "commerce clause" of the Constitution (Art. I, § 8), the power of Congress does not extend to either organized or unorganized possessions. The power over possessions, as noted above, derives from Article IV, § 3 of the Constitution, and here, as always, the question is: *How* did Congress exert its power? The answer is clear: Congress exercised its power by using the specific word "Territory" which, because of all the history we have recited above, had a limited and plainly understood meaning even when used in its most comprehensive sense. It was a term that did *not* include unorganized land areas. If Congress meant to change this definition in the Sherman Act, it

certainly did not say so; the later Report on the Clayton Act shows that Congress knew precisely what it had done in Section 3 of Sherman.

The *per curiam* opinion states that because "'Congress intended to include all territories to which its powers might extend,' it follows that Samoa is a 'Territory' within the meaning of Section 3." This is a non sequitur. Both on its facts and in its express holding, *Shell* confirmed again that when Congress says "territories" in a statute, it means *organized* "territories" and that Section 3 of the Sherman Act extends to all, but *only* to, *organized* territories. No amount of disjointed, incomplete quotation can change what the Court there said and did on the facts before it.

2. AMERICAN SAMOA HAS NO ORGANIC ACT, IS THEREFORE NOT ORGANIZED AND HENCE NOT A "TERRITORY" WITHIN THE MEANING OF SECTION 3 OF THE SHERMAN ACT.

In the first part of our petition we recounted the numerous times that Congress has considered giving American Samoa an Organic Act. In every instance the decision was made not to do so because the Samoans do not want to be citizens, they do not want to have our laws, they do not want to be "Americanized" economically. In a word, they do not want to be an *organized Territory* because they fear that their "way of life would disappear" and they "refer to the history of their Polynesian relatives in Hawaii . . . as proof of basis for this fear" (supra, pp. 8-9). Hence, Samoa is still today what it was some seventy years ago at the time of cession — an unorganized insular possession.[22]

We quote again from the NLRB's decision in the *Star-Kist* case which so succinctly summarized the status of American Samoa. In that case, it will be recalled, the Act

22. This is not in issue. The Solicitor General's Jurisdictional Statement concedes at page 3: "American Samoa is not an organized territory • • •."

in question, like Section 3 of Sherman, was made applicable to "any Territory" and the issue for decision was whether it applied in American Samoa (Appellee's Motion to Affirm, p. 36). It was held:

> "American Samoa is neither 'incorporated' nor 'organized.' It does not have even a rudimentary government established by Congress, but rather one established by the executive branch in the person of the Secretary of the Interior, to whom administrative authority was delegated by the President. It is not specifically included as a territory in Section 14(c)(2). Further distinguishing American Samoa from those dependencies of the United States which have been found to be 'Territories' is the fact that its inhabitants, while American Nationals, are not citizens, that it is not within the jurisdiction of any Circuit Court, and that it has no Federal District Court.
>
> "Under all of the relevant circumstances, particularly the fact that Congress has not established any form of self government for American Samoa, and in the absence of a clear Congressional mandate, we conclude that American Samoa does not come within the jurisdiction of the Act" (*Star-Kist Samoa Inc.* (N.L.R.B. 1968) 68 L.R.R.M. 1532, 1533).

CONCLUSION

The financial interest of petitioner in this case is relatively insignificant. The decision of this Court, however, is of crucial importance to the Samoan people. It is also significant in its impact upon the purpose of Congress, expressed and emphasized over and over again, to preserve the Samoan way of life, to prevent the "Hawaiianizing" of American Samoa. Congressional Committees have given long and repeated consideration to the question whether the rudimentary economy of Samoa should be "Americanized." Always, after hearings and most careful review of all relevant factors, Congress has concluded that the interest of the Samoan people is best served by preserving the tribal

way of life. This was the expressed view of the Samoan legislature as late as 1970 (pp. 18-19, supra). Congress has recognized, and certainly it is demonstrably true, that the Samoan way of life is inconsistent with the principles of free competition embodied in the Sherman Act—indeed, inconsistent with many basic constitutional guarantees applicable in our totally different society. If a radical conversion in the life style of the Samoans is to be made, it appropriately should come through Congressional action after further sympathetic consideration of the needs and interests of the natives.

Never has there been even a suggestion since 1890 that Section 3 of Sherman applies to American Samoa or to any unorganized possession. Aside from the Labor Relations Act which was before the NLRB in the *Star-Kist* case quoted above, the same can be said, so far as our research discloses, of every Congressional Act that is limited in its applicability to "Territories"—and there are probably hundreds of them in the Code. Nevertheless, by virtue of this Court's *per curiam* opinion, the Attorney General and other law enforcement agencies of the United States are immediately faced with investigation and enforcement of all those laws (including the Labor Relations Act and the Civil Rights Acts[23] cited in our motion to affirm) which are applicable to the "Territories" but which up to the present time have been considered by all to be inapplicable to the unorganized areas which have been placed by Congress in the paternalistic care of a Department head. Not the least of the problems to be encountered is the absence of the Federal court system in American Samoa and other unorganized possessions, and the fact that the islands have

23. The Civil Rights Acts are totally inconsistent with the Matai system of land tenure and numerous other facets of Samoan life noted above.

not been placed within the jurisdiction of any Federal court anywhere.

We respectfully suggest that a principle which has been accepted for decades without question, and which underlies many, many statutes enacted by Congress, should not be summarily overturned by a *per curiam* ruling from this Court without briefing, without argument and without precedent. We further respectfully submit that, contrary to the statement in the Court's brief *per curiam* opinion filed January 24th, appellee *has* suggested reasons "why Congress would have wished to exclude unorganized territories from the coverage of Sec. 3."

We respectfully request that this Petition for Rehearing be granted, and that the judgment of the District Court be affirmed, or that the case be set down for oral argument.

Respectfully submitted,

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Dated: February 16, 1972

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that he is a member in good standing of the bar of this Court, that he has prepared the foregoing Petition for Rehearing and is familiar with its contents, and that Appellee is presenting such petition in good faith, and not for delay.

Dated this 16th day of February, 1972, at San Francisco, California.

/s/ Francis R. Kirkham
Francis R. Kirkham

Attorney for Appellee, Standard Oil Company of California

Appendix A

THE TERRITORY OF AMERICAN SAMOA

REPORT

FROM

THE FUTURE POLITICAL STATUS STUDY

COMMISSION

TO THE

ELEVENTH LEGISLATURE OF

AMERICAN SAMOA

SECOND REGULAR SESSION

February 9, 1970

March 18, 1970

Honorable Members of the
Eleventh Legislature
Government of American Samoa
Pago Pago, American Samoa

Dear Honorable Members:

The Future Political Status Study Commission respectfully submits its report thus fulfilling its mandate under Public Law 11-39.

Respectfully,

/s/ Salanoa S. P. Aumoeualogo
SALANOA S. P. AUMOEUALOGO
Chairman

/s/ Le'iato T.
LE'IATO T.

/s/ Fofo I. F. Sunia
FOFO I. F. SUNIA

/s/ Fainuulelei S. Utu
FAINUULELEI S. UTU

/s/ Muagututi'a F. Tuia
MUAGUTUTI'A F. TUIA

/s/ Mere T. Betham (Mrs.)
MERE T. BETHAM (Mrs.)

RAPI SOTOA

ACKNOWLEDGMENTS

The Political Status Study Commission of American Samoa wishes to respectfully express its deep and sincere appreciation for the advice, help and courtesies which the Government and people of New Zealand, Fiji, Tonga, Western Samoa, Puerto Rico, Virgin Islands, and the State of Hawaii have extended to it.

The Commission also extends its gratitude to the members of the Congress of the United States of America and their staff who generously made their time and offices available for the studies of the Commission; to the Director and Staff of the Office of Territories, Department of the Interior; and to the President and faculty of the University of Hawaii.

The Governor and many officials of the Government of American Samoa donated their time and advice to the Commission and the Commission hereby acknowledges their contributions.

The Commission wishes to express also its appreciation to the leaders and people of American Samoa and Samoan communities in the United States, Hawaii and New Zealand for their help and courtesies.

Finally, the Commission wishes to acknowledge the assistance and aid of Mr. Dean Kaufman of the VISTA Legal Center in Pago Pago, American Samoa, who helped in the preparation and editing of this report.

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INTRODUCTION

The Future Political Status Study Commission for American Samoa was created by Public Law 11-39 enacted by the Eleventh Legislature during its First Special Session in July 1969. The Commission was created in the context of increasing political awareness among the people of American Samoa. At the end of a decade which brought unprecedented physical and economic development to American Samoa and at the beginning of a decade which promises to bring even more wide-reaching changes, the ultimate political destiny of American Samoa has become a matter of much discussion, some confusion, and great importance.

The Legislature gave the Status Commission a mandate to:

(1) ". . . study alternative forms of future political status open to American Samoa and . . . assess the advantages and disadvantages of each";
(2) ". . . study and appraise the history, the development and the present status of political units comparable or relevant to American Samoa, both within and outside the jurisdiction of the United States"; and
(3) ". . . present a complete report of its findings and recommendations to the Second Regular Session of the Eleventh Legislature."

To effectuate these aims, in September of 1969, the Commission toured Puerto Rico and the Virgin Islands. In Washington, D.C., the Commission conferred with members of the United States Congress and officials of the Department of the Interior. The Commission also took the opportunity of this trip to meet with Samoan communities in Los Angeles, San Diego, San Francisco and Honolulu,

Hawaii. In November of 1969, the Commission visited New Zealand, Fiji, Tonga, and Western Samoa. The Commission studied the political status of each country and territory it visited. Economic development plans and programs were of particular interest, but education, health, and other social services were observed and discussed. The Commission's hosts generously provided the opportunity for the Commission to study these governmental operations.

Upon returning to American Samoa, the Commission held a number of meetings with the leaders and people of the territory and continued to study the complex question of American Samoa's political future. This report is the summation of what the Commission has found and the conclusions it has drawn from those findings.

There are six potentially viable political alternatives open to American Samoa. Briefly, these are: (1) Independence; (2) A union with Western Samoa; (3) Becoming an incorporated territory of the United States under an Organic Act; (4) Commonwealth status—similar to Puerto Rico's; (5) Becoming a county within the State of Hawaii; and (6) Retaining American Samoa's present status as an unincorporated insular possession of the United States.

In choosing these six alternatives, the Commission has attempted to present to the Legislature a complete enumeration of the feasible paths open to American Samoa. It has discarded theoretical possibilities, such as statehood, which it feels are beyond any hope of realization, but has included several proposals which, although not likely, have articulate and vocal supporters within the Samoan community. This variety of public opinion is one of the outstanding characteristics the Commission has noted—and hopefully this report will present facts which will aid the people of American Samoa in making an informed and rational judgment about their political future.

The Commission was created in a time of questioning. The Legislature and the people of American Samoa have begun to question the goals of their public education program, the structure of their courts, the priorities and planning of public construction, and the relationship between the branches of the Government of American Samoa and that government's relationship with the government of the United States.

Beyond the complicated aspects of questions such as these lies the fundamental question of American Samoa's political future. An educational or judicial system well-suited for a society moving towards closer union with the United States might be quite inappropriate for a society seeking to emphasize its traditional values and political independence. A local government receiving increasingly large annual appropriations through the Department of the Interior is bound to evolve into a different relationship with the United States than a local government which receives such funding through other, more specialized channels. Thus, we cannot avoid considering our political future, for it necessarily enters into important decisions currently facing both the Legislature and the Governor.

The function of this report is to explore and evaluate the political alternatives open to American Samoa, not to select an alternative on behalf of the people. The Commission's role is merely to provide an analytical report which can be the basis for intelligent discussion. The final decision rests, of course, with the people of American Samoa and the Congress of the United States.

While the history and present status of American Samoa are in many ways unique (see Appendix), our society has much in common with other peoples of the world. We are not the first small and developing society to seek the protection and receive the economic support of a stronger and

wealthier mother country. A study of other developing societies illustrates both the possibilities and the problems which the withdrawal of such political and economic bonds can cause in a land such as ours. A major purpose of this report is to enable American Samoa to understand and benefit from the experience of other people.

With the foregoing in mind, the Commission presents its analysis and recommendations.

I—INDEPENDENCE

American Samoa is presently a possession of the United States of America. It has no sovereignty of its own and looks to the United States for those items which any area must have—defense, currency and postage, status in international affairs, etc. If American Samoa were to become independent, it would be a sovereign state among nations, and although it might still contract with the United States to supply certain prerequisites of sovereignty, it would be "on its own" for all practical purposes.

As an independent nation, Samoa could enter into international agreements with any other nation, have its own foreign policy, have complete control of its internal affairs, in short—it could behave like any other sovereign state.

Advantages

1. The primary advantage of independence would be that Samoans could order their own affairs without any more interference than they chose to request. Thus, as an independent state, Samoa could draft its own constitution, choose any system of government it desired, any method of land-holding and tenure, *ad infinitum*.

2. Independence would allow Samoa to be governed exclusively by Samoans. If so desired, all government positions could be reserved for Samoans, or, even if some

key non-Samoan personnel are required for the first few years, there would be increased participation by Samoans in their own government.

3. As an independent state, Samoa could choose its own foreign policy. It could have direct diplomatic relations with other countries, and participate in international organizations. As an independent state, it would be eligible for foreign aid, and could, if desired, provide by treaty for its military defense.

4. Independence would aid in the growth of Samoan pride and loyalty to Samoa—with whatever tangible and intangible advantages this might bring.

Disadvantages

1. If Samoa were independent, it might well go broke. The present economy of American Samoa is quite limited, and withdrawal of U.S. financial assistance would, at best, cause at least a short-term drop in the standard of living. Samoa has very limited natural resources, including a miniscule land area, and tiny population by world standards. Although there are smaller nation-states (i.e. Monaco, Vatican City), they almost invariably have a peculiar base for their economy (tourism, religion, etc.), which an independent Samoa would lack. Samoa has very little arable land, and would have to either live on a subsistence economy or import foodstuffs. With its extremely limited industrial potential, it would be difficult for Samoa to earn the foreign exchange necessary to pay for these imports. A glance at Tonga or Western Samoa, both of which are larger than American Samoa in both land area and population base, should be sufficient to illustrate some of the economic problems independence brings.

2. Presently, American Samoa has one of the fastest growing populations in the world. Since American Samoans

can freely emigrate to the United States, much of this growth has been absorbed by the states of Hawaii and California. If Samoa were independent, immigration into the United States might be severely restricted (c.f. Western Samoa) and the finite land mass of Samoa would have to support a greater number of people than it is capable of doing under present technology. Likewise, the United States may deport those American Samoans who are not United States citizens and who are now living in the United States, if Samoa severs its ties with the United States. This influx would, perhaps double the present population of American Samoa, and would create severe problems in jobs, housing, schooling and other social services.

3. An independent Samoa would be fair game for an expansionist major power. In order to preserve its independence, Samoa would almost necessarily have to contract with one of the major powers for its defense. This would nullify many of the benefits which sovereignty might provide. Samoa would lose credibility in world affairs, and might be considered a mere client-state of its military benefactor. Likewise, Samoa could not at its present economic level afford to maintain diplomatic relations with many other nations. So it would doubtless have to choose another power to represent its interests in world affairs. We need not look far to see both problems and the possibilities which this type of arrangement brings.

4. An independent Samoa could not expect entry of its exports into the United States under privileged conditions and might have a difficult time competing in world markets.

5. Independence may not be possible. Even if the Samoans choose to be independent, the United States may refuse to allow this secession. It is illusory to believe that Samoa could become independent unless the United States

assented. While the reaction of Congress to a proposal that Samoa become independent is hard to judge, it is not inconceivable that Congress would refuse any such request—whether such refusal were "justified" or not.

RECOMMENDATION

Independence is the ultimate goal of any freedom loving people, including the Samoans. If possible, it is always better to be the master of your own house. However, at the present time, the Commission believes that independence is just not a practical choice for American Samoa. The Commission does not believe that an independent Samoa would prove to be an economically viable unit in today's world economy, and cannot recommend that Samoa exchange economic suicide for the more intangible benefits independence would bring. If in the future, Samoa became economically self-sufficient, the Commission recommends that independence be seriously reconsidered.

II—UNION WITH WESTERN SAMOA

The people of the various Samoan islands form a single ethnic group, sharing the same language and culture. Although never truly unified under a single ruler (see Appendix), Samoans have always considered themselves to be one people. Only within the past 70 years has "American" Samoa stood on its own—apart from "Western" Samoa.

Western Samoa has been an independent nation since 1962. Its capital, Apia, lies approximately 90 miles west of Pago Pago. Western Samoa possesses a land area roughly 10 times greater than that of American Samoa and a population 4 times as large. Except for a brief period of German rule prior to World War I, Western Samoa was governed by New Zealand under a League of Nations mandate from 1918-1945 and a United Nations Trusteeship

from 1945-1961. New Zealand, under a Treaty of Friendship, continues to supply Western Samoa with economic and technical assistance, and acts as Western Samoa's representative in international affairs.

Western Samoa is primarily an agricultural country, and depends upon exports of bananas, copra and cocoa for foreign exchange. Since independence, Western Samoa has been financially independent, but has accepted grants from New Zealand to aid in education and agriculture.

Advantages of union with Western Samoa

1. A unified Samoa might have a stronger economy than the present, divided Samoa. Western Samoa has extensive tracts of arable land, something which American Samoa sorely lacks, and American Samoa has an outstanding harbor, which could be a key factor in the industrial development of a unified nation. Similarly, the increased population and land base of a unified Samoa should provide larger markets and a greater pool of trained talent—both of which would serve as economic stimuli. However, both American and Western Samoa remain primarily agrarian societies, and at present their economics are more redundant than complimentary.

2. If Samoa became a single nation, Samoans would be able to control their own affairs. In this respect, union has many of the advantages which independence offers. Samoan traditions could be protected to the fullest extent, and land ownership could be restricted. Likewise, all of the people of Samoa, as members of an independent Samoan nation, would benefit from the advantages which sovereignty offers in international affairs.

3. If all the Samoan people were unified as residents of a single nation, Samoan national pride would be increased. Putting the "two Samoas" back together again would show

the world that artificial lines drawn by foreign powers need not permanently divide a people.

Disadvantages of union with Western Samoa

1. Western Samoa is a parliamentary democracy, modeled upon the British system. American Samoa's representative institutions fall into the United States mold. If the two Samoas were to merge, one would have to sacrifice its form of government. Likewise, American Samoa's voice in a unified Samoa might well be muffled by the larger population of Western Samoa, no matter what form of government is chosen.

2. At present American Samoa must import food. If the United States no longer supplied federal funds to a unified, independent, Samoa—paying for these imports might become difficult. At the present time, however, wages and prices are higher in American Samoa than in Western Samoa. If the two Samoas joined, many American Samoan wage-earners would have to accept substantial decreases in salary.

3. Both Western Samoa and American Samoa have experienced large emigrations of their people—to New Zealand from the former and to the United States from the latter. If Samoa became an independent country, one or both of these "safety valves" might be closed. Without emigration, overpopulation could rapidly become a serious problem in a unified Samoa.

4. At present, neither the leaders of Western Samoa nor the leaders of American Samoa favor a union. The Commission conferred at length with Western Samoa's leaders during its recent trip, and detected no enthusiasm for merger. Likewise, none of the Commission members favor merger at this time.

RECOMMENDATION

The Commission, after reviewing many reports and discussing the matter with leaders of both Western Samoa and American Samoa, does not recommend merger at the present time. Although this alternative might prove desirable at some time in the future, neither American nor Western Samoa is ready for merger under present economic and political conditions.

III—ORGANIC ACT STATUS

At the present time, the only Congressional declaration about American Samoa's political status is contained in the Act of February 20, 1929, which declares that until Congress shall provide for the Government of the islands of American Samoa, all civil, judicial, and military powers shall be vested in such person or persons as the President of the United States shall direct. Specific provisions for the "Government of the islands of American Samoa" would be accomplished through Congressional passage of an Organic Act, which would make American Samoa an incorporated territory of the United States. It is this alternative which will now be discussed.

Advantages of Organic Act Status

1. An Organic Act for American Samoa would specifically define the rights and privileges of American Samoans by providing a permanent Constitution for American Samoa and would end the uncertainty which now exists over the extent to which the United States Constitution applies to American Samoa.

2. In clarifying the extent of application of the United States Constitution, however, an Organic Act passed by Congress would not be likely to permit the continued legal protection of the Samoan land and matai systems. These

institutionalized aspects of traditional Samoan life are profoundly antithetical to the principle of equal rights for all citizens which is embodied in the American Constitution. It is therefore highly doubtful that Congress would restrict the application of the Constitution so as to permit the continuance of the Samoan land and matai systems.

3. A popularly-elected Governor might soon become a reality rather than a dream under Organic Act status, just as it has for the Virgin Islands under its Organic Act.

4. An Organic Act would allow the judicial system of American Samoa to be integrated into the federal court system. Thus, persons aggrieved by decisions of the local court would be guaranteed the right to appeal to higher federal courts.

Disadvantages of Organic Act Status

1. The major disadvantage of Organic Act status would be the threat it would pose to the traditional Samoan social structure. Even if Congress could be persuaded to allow local legislation protecting the Samoan land-tenure and matai-title systems, such legislation might well be held unconstitutional. As the Honorable Albert B. Maris, while a judge of the Third Circuit, United States Court of Appeals wrote to the Secretary of the Interior on October 3, 1960:

> ". . . the people of Samoa, as their constitution indicates, cling with remarkable tenacity to their ancient customs and their communal family land holdings and way of life with its matai system of titled and privileged heads of families set above the untitled people of the community. For 60 years the United States has recognized and supported these customs. But they are wholly inconsistent with our American System of individual enterprise and property rights and they would, therefore be doomed to ultimate destruction if we should set upon a course of preparing the people for American citizenship with the accompanying con-

stitutional obligation to accord stateside American citizens equal rights in property and commerce in Samoa."

2. An Organic Act may well lead to the "development" of American Samoa by industrialization or as a tourist-haven. While it is difficult to fault an expanded economy, expansion at the expense of the Samoan people, similar to the subjugation in Hawaii of the Hawaiians, is hardly desirable.

3. An Organic Act and accompanying "integration" with the United States, would probably be the death knell for Samoan custom. Samoa would inevitably become "Americanized", and traditional ways—in politics, government, ceremony, agriculture, etc.—would decrease in importance.

RECOMMENDATION

The Commission does not believe that Organic Act status is feasible at the present time.

The Commission recommends that if Organic Act status is proposed to Congress, a thorough program of public education be instituted to sensitize Samoans to the value of land and the problems which the thoughtless sale of land for a quick profit can create.

IV—COMMONWEALTH STATUS

Commonwealth is a unique status. A brief review of the political history of Puerto Rico is probably the best introduction to a discussion of the advantages and disadvantages it might offer American Samoa.

Puerto Rico became a United States Possession on July 25, 1898, at the conclusion of the Spanish American war.

Shortly thereafter, civilian governors appointed by the President, with the consent of the United States Senate, administered the island. At the same time, Puerto Rico was permitted to send a Resident Commissioner to sit in the United States Congress with a voice on the floor of the House of Representatives and membership in some of its committees, but without the right to cast a vote.

Largely through the efforts of the first two Puerto Rican Resident Commissioners, Congress conferred United States citizenship on Puerto Ricans in 1917.

Following World War II, President Truman appointed the first native-born governor. In 1948, Congress passed a law authorizing Puerto Ricans to elect their own governor.

The Commonwealth of Puerto Rico was established in 1952. A Constitutional Assembly was elected to draft the Constitution. This Assembly was composed of 92 persons representing the various social, economic and political factors in the country. In March, 1952, the Constitution was submitted to the voters at a referendum, and was approved by the people overwhelmingly.

The new Constitution was officially proclaimed by the Governor of Puerto Rico on July 25, 1952, thus inaugurating Commonwealth as a new system of government which the Puerto Ricans chose for themselves.

One of the main considerations in choosing this status was the desire of the Puerto Ricans to maintain and preserve their cultural identity as a Spanish-American people, together with their wish to maintain economic and political ties with the United States.

Statehood would have meant the eventual cultural assimilation of the Puerto Rican people into the American way of life. It would also have meant a step backward in economic development because of the high taxes required by the federal treasury.

Independence would have dissolved all ties with the American nation, from common citizenship to free trade.

Not desiring either of these alternatives, a new political concept was created—a voluntary association of the United States and Puerto Rico through a Commonwealth. This guarantees Puerto Rico full authority to manage its internal affairs, but allows it to maintain its union with the United States.

The Commonwealth has a republican form of government, with the traditional separation of the executive, legislative and judicial powers, and separation of church and state. The civil and political rights of citizens are guaranteed by a Bill of Rights in the Constitution.

Executive power is exercised by a Governor, who is elected by direct vote every 4 years. The Governor appoints, with the consent of the Senate of Puerto Rico, the members of his Cabinet, composed of the Secretaries of the nine executive departments.

Legislative power is vested in a Legislative Assembly composed of a Senate, of 32 members, and a House of Representatives of 64 members, elected by the people every four years.

A Supreme Court of nine justices caps the judicial structure. The lower courts include Superior and District courts and Justices of the Peace. All judges are appointed by the Governor with the consent of the Senate of Puerto Rico. In cases involving the constitutionality of a law, decisions of the courts of Puerto Rico may be appealed as high as the Supreme Court of the United States.

In 1962, the Legislative Assembly of Puerto Rico proposed to the United States Congress that a plebiscite be held, to choose between the alternatives of Commonwealth, Statehood, and Independence.

Congress, in 1964, created a joint commission, the Status Commission, composed of 7 representatives from the United States and 6 from Puerto Rico, to study the present and future relationship between Puerto Rico and the United States. Among the United States members of the Commission were members of Congress of both principal parties. On the Puerto Rico delegation, members of all three parties were represented.

The Commission worked two years preparing its report, and held public hearings during which various constitutional, political, economic, social and cultural factors relevant to the three political status formulas were presented and discussed. The Commission made its report in August, 1966 to the President and the Congress of the United States, and to the Governor and the Legislative Assembly of Puerto Rico.

The Status Commission concluded that all three forms of political status—Commonwealth, Statehood, and Independence were valid, and conferred upon the people of Puerto Rico equal dignity and status, as well as national citizenship.

The Commission recommended that the will of the citizens of Puerto Rico be expressed through a plebiscite choosing betwen continuation of Commonwealth status, Statehood or Independence.

In the Plebiscite of 1967:

425,132 (60.4%) voted to continued Commonwealth Status

274,312 (39.9%) voted to request Statehood

4,248 (0.6%) voted to attain Independence.

The plebiscite was conclusive proof that most of the people of Puerto Rico were satisfied with their unique Commonwealth status.

Advantages

1. The primary advantage of Commonwealth status for American Samoa would be that it would enable Samoa to become completely self-governing. Under a Commonwealth Constitution, Samoa could elect its own Governor, just as Puerto Rico does. Likewise, the Samoan Legislature would have complete autonomy in legislating about matters of internal interest. Similarly, Samoa could have a self-contained judicial system, with both trial and appellate courts. The right to appeal to the federal appellate courts could be preserved for cases in which a constitutional issue was involved.

2. If Samoa were a Commonwealth, it could devise a tax and revenue structure fitted to Samoa's needs. Taxes and tax rates would be established by the Legislature, and all local revenue would be spent locally. Samoa would also become eligible for certain federally funded programs which are now available to the Commonwealth of Puerto Rico, but denied to the Territory of American Samoa. There is also the possibility of increased economic development under Commonwealth—foreign and United States investment in Samoa would probably increase.

3. As citizens of a Commonwealth, Samoans could have United States citizenship just as Puerto Ricans do. United States citizens resident in a Commonwealth are not allowed to vote in Presidential elections, however, and thus the benefits of United States citizenship for Samoans would not be substantial.

Disadvantages

1. If Samoa were a Commonwealth, it would probably see the loss of its land-tenure and matai systems. Although it is possible that Congress would grant Commonwealth

status with a proviso that the Samoan Constitution could protect the Samoan land and matai systems, this is unlikely. Without such a reservation, any person could buy and hold land and compete in business with Samoans.

2. If Samoa were to become a Commonwealth, the level of federal support would become uncertain. Since, at the present economic level, federal support provides a major prop of the economy, its removal would have serious, immediate consequences for the Samoan standard of living. Commonwealth status would not create any other source of funds to compensate for this loss, until industrialization (if any) became well advanced.

3. If Samoa became industrialized and "developed" under Commonwealth status (and a certain amount of this would be inevitable), Samoan identity and culture would increasingly become submerged in the pool of American culture. By asking for Commonwealth status, Samoans are asking to be made more a part of the United States and (inevitably) its way of life.

RECOMMENDATION

The Commission cannot recommend Commonwealth status at this time. The losses to Samoan culture and the social structure would be too great. The Commission, however, does recommend that Commonwealth be seriously considered by the proposed (see Final Recommendations) Joint Commission on Samoa's political future.

V—BECOMING A COUNTY WITHIN THE STATE OF HAWAII

From time to time, certain politicians, both in Washington and in Pago Pago, have suggested that American Samoa become a county within the State of Hawaii. Americans who concern themselves with American Samoa often con-

sider Hawaii a tree into which a small twig called American Samoa is attached.

According to the Samoan legend, people from Manu'a sailed north one day and eventually reached a group of islands they called "Savaii". (In time, this was corrupted into "Hawaii"). After discovery, cultural exchange between Samoa and Hawaii was limited and later became non-existent. Today, after centuries of cultural divergence (particularly within the past 100 years) there are few similarities between the two people.

Advantages

1. If American Samoa became a county within the State of Hawaii, it would be fully integrated into the United States of America. Samoans would be citizens of the United States and have the same privileges, protections, and responsibilities as other United States citizens. They could vote in national elections and would be eligible for positions where citizenship is a prerequisite.

2. As a county of Hawaii, Samoa would share equally with Hawaii in the vast resources of that state. The economic, employment, health, education and myriad other problems of Samoa would become problems of the State of Hawaii as well. Samoa would be laying its burdens on broader shoulders.

3. As citizens of Hawaii, Samoans could have a voice in the selection of Hawaii's Governor and representatives to Congress. Samoa would not have its own Legislature, but would have a seat or two in the state legislature. As a county, Samoa would have a county council or assembly which would be concerned with local needs in much the same manner as the present legislature. But problems beyond the capacity of the county government would be referred to the state legislature.

4. Hawaii today has many doctors, lawyers, engineers, educators and other skilled professionals. The services of these people would become available to Samoans if Samoa were a county of Hawaii. Today American Samoa cannot afford much of this expensive, but valuable, talent.

Disadvantages

1. If Samoa joins Hawaii, Samoans will lose their identity. They will no longer be Samoans, but just plain Americans. Samoans will be a small minority in a state of minorities. Chinese, Japanese, Korean, Filipinos, Hawaiians, Portuguese, Samoans, and palagis are all residents of Hawaii. Each minority tries very hard to maintain its own identity. Samoans will be able to maintain their identity for a while because of geography. But money is no respecter of geography and culture. Samoans will soon be living in the high-rises of Honolulu, working in the pineapple fields of Maui and driving tourists up the canyons of Kauai. There will be more inter-racial marriages, and Samoans may cease to exist as a separate ethnic group.

2. Politically, American Samoa will be overwhelmed by Hawaii. While Samoans will have a direct line to Congress through their elected representatives, they will no longer be able to go there as Samoans. Most of our problems will be referred to Honolulu where they will be considered no more important than the other pressing needs of Hawaii. Samoa has less than 8,000 qualified voters. What politician of statewide or national stature would be interested in such a small constituency? It would take years to develop political leaders who could achieve statewide acceptance and once in office pay heed to Samoa.

3. Samoan customs and traditions would soon be practiced only for the tourists' cameras. The land-tenure system would be undercut by the removal of legal protection and

the pressure of entrepreneurs, both of which would follow in the wake of union with Hawaii.

4. Merger with Hawaii will create serious problems of adjustment. Many Samoans are not completely ready to compete. Samoan businesses may be engulfed by large-scale Hawaii enterprise. Hawaii's faster-paced way of life will be a jolt to the traditional Samoan outlook.

RECOMMENDATION

After reviewing this alternative, the Commission cannot recommend it for American Samoa.

VI—AMERICAN SAMOA—THE PRESENT POLITICAL STATUS

At present, American Samoa is an unincorporated insular possession of the United States (see Appendix). Although this basic status has remained constant since cession, Samoans have progressively exercised more authority over their own affairs. Under the Revised Constitution of American Samoa, the elected Legislature of American Samoa may "pass legislation with respect to subjects of local application" (Art. II, Sec. 1) not inconsistent with applicable United States law and treaties. Neither the Legislature nor the people, however, have any say in the appointment of the Governor and Secretary of American Samoa or in the selection of the Judiciary. Likewise, the Governor, and not the Legislature, is the final arbiter of the all-important budget requests for Federal funds which are presented annually to Congress.

While in recent years the Legislature has become a respected source of authority recognized by both the people and the Governor, the same period has seen the inexorable pressures of the modern world chipping away at the scope

and depth of tradition among the Samoan people. While social ceremonies and functions of traditional origin continue, the real meaning is often-times absent and the crucial role of tradition in the present political system is diminishing.

Today, Samoans are better educated than ever before, and a new degree of sophistication is obvious. Samoan political opinion has shifted from passive acceptance of an appointed government to a strong desire for self-government within the American framework. A glance at recent legislative activity will make this new awareness apparent.

With these general comments as background, the advantages and disadvantages of the *status quo* can be articulated.

Advantages

1. The present system has the great advantage of familiarity. While not perfect, it is tried and true. In a developing country, like American Samoa, this is of tremendous importance. Radical changes in Samoa's traditionally oriented society may have serious consequences.

2. The present system honors and protects the traditional social structure. Thus, Samoans have been able to retain control over their communal lands and the "Matai" system has been preserved. If the political status of American Samoa became such that the United States Constitution had full force and effect, these two bases of traditional Samoan society might well be undercut. Such a decision would create a major rift in Samoan society and might eventuate the loss of Samoan ownership of Samoan land. In many ways, the Samoan of today is still the master of his own way of life, although not of his own house.

3. The present system allows Samoans to incorporate their traditional method of government into the framework

of democratic institutions. Members of the Senate are chosen by "Samoan custom by the County Councils" (Art. II, Sec. 4, Revised Constitution of American Samoa) and many local officials are appointed with an eye towards Samoan custom.

4. While not U.S. citizens by birth, American Samoans are still entitled to a number of privileges as members of the American family—for example, they are protected against foreign attack or exploitation, allowed free entry into the United States, and are included in financial and economic assistance programs made available by the federal government.

Disadvantages

1. On the other hand, it may be argued that a major disadvantage of the present system is that it is not truly democratic. The Senate is chosen from the ranks of registered Matais, and a number of other officials, from the Governor and Chief Justice on down, are appointed by persons not responsible to the Samoan electorate. This is perhaps the major disadvantage of the *status qua*. While the method of selecting Senators is sanctioned by traditional Samoan custom, and the matais who elect Senators are acting as representatives of their families, there is no excuse for an appointed Governor. When the chief executive is chosen by fiat and imposed upon, rather than elected by the people, democracy is necessarily sacrificed. While an appointed Governor may have the noblest of intentions, his appointment without the consent of the governed is antithetical to the very principles upon which America was founded.

2. At this time, "all civil, judicial, and military" power in American Samoa is vested in the Secretary of the Inter-

ior. It is he, not the President or Congress, who "approved" the present Constitution of American Samoa, and presumably he could alter the present form of government by decree. Although such action would raise serious legal and moral questions, the possibility remains a threat to the present political status of American Samoa.

3. Since, in the last analysis, it is the Congress of the United States which is responsible for American Samoa's destiny, the people of American Samoa should have some means whereby they may present their desires directly to Congress. The *status quo* provides no direct channel comparable to that provided by the delegates other territories have sent to Congress. Perhaps as a result of this lack of a full-time Congressional delegate, the people of Samoa have not been able to adequately expose their real needs to Congress.

4. The present system is essentially "colonial". The Governor is appointed by the Secretary of the Interior and the number of instances in which these two men are of differing political persuasions is not great. Thus, Samoans now know that if the national administration should change hands, they can expect that a new Governor (with all the "breaking-in" problems any novice experiences) will soon be arriving.

5. Another weakness of the present system was illustrated recently when the Chief Justice was replaced by the Secretary of the Interior, despite the strong protests of the Speaker of the House of Representatives and the President of the Senate. Under the present system neither the Governor nor the judges are truly independent. The Secretary of the Interior may hire and fire without consulting the very people whose daily lives are affected by his decision.

6. The present practice of appointing top officials gives rise to many potential abuses of the principle that power should be separated, checked and balanced. Not only do all the department heads owe their appointment to the Governor, who need not consult the Legislature before exercising his discretion, but the Governor could, because of his relationship with the Secretary of the Interior, cow much of the opposition to a controversial proposal, which might arise if the Governor's powers were more circumscribed.

FINAL RECOMMENDATIONS

1. AFTER CAREFULLY REVIEWING, COMPARING, AND CONTRASTING THE ADVANTAGES AND DISADVANTAGES OF THE POLITICAL ALTERNATIVES CONSIDERED—ALWAYS WITH CONDITIONS IN PRESENT DAY AMERICAN SAMOA IN MIND—THE COMMISSION BELIEVES THAT THE MOST SUITABLE POLITICAL STATUS FOR AMERICAN SAMOA AT THIS TIME IS TO CONTINUE AS AN UNINCORPORATED AND UNORGANIZED TERRITORY OF THE UNITED STATES. THE COMMISSION FEELS THAT CONTINUATION OF THE PRESENT POLITICAL STATUS IS THE MOST DESIRABLE ALTERNATIVE IF CERTAIN CHANGES ARE MADE IN THE CURRENT METHODS OF SELECTING THE GOVERNOR AND LEGISLATURE OF AMERICAN SAMOA.

What American Samoa needs most at this moment is to maintain its traditional culture, which is embodied in its communal-land and matai systems. Major change in the political and social order would abruptly deprive Samoa of its strong traditional foundation and thrust it into a

position it is not yet ready to occupy. It is inevitable, however, that the old ways must make room for the new, and the Commission fully recognizes the need and importance of aiming for more complete democracy. Only with time can people move from one social order to another. American Samoa has taken long strides along the road to full democracy in the recent past and an orderly and painless transition is far more desirable than the arbitrary imposition of a new political and social order. The modern world has found, much to its sorrow, that the sudden imposition of new forms of government upon people who are not socially and mentally prepared for such changes can lead only to chaos or dictatorship. The Territorial Motto is: "Proceed With Caution"—our forefathers, when stuck on the vast Pacific, confused and without force to push their canoes, would say: "Wait for the wind".

The Commission is fully aware that the world cannot be kept away from American Samoa. Neither can American Samoa continue to stand apart forever from the rest of the world. New ideas cannot and must not be suppressed. Today, many young Samoans are well educated, and their lives have become such that traditional Samoan culture may mean little or nothing to them. Some consider this new attitude a threat to the Samoan way of life. The Commission chooses to view it as the inevitable result of social change, which should neither be thoughtlessly embraced nor opposed. The new and the old must be mixed in a suitable blend. By retaining the fundamental principles of the old system and accepting a new, more democratic, political structure, American Samoa can gracefully become a part of the modern world, without casting its rich heritage aside.

Each of the political alternatives discussed has serious disadvantages—the Commission has tried to take these into account in making its final recommendations. The Commis-

sion realizes that Samoa cannot have everything it wants, and that certain of the old guard traditions must be abandoned if democracy is to be achieved. The road to the present political status has been noticeably free of serious disagreements and violence. This is a strong argument in favor of maintaining the present course and rate of political development.

Members of the United States Senate Committee who met with the Commission were explicit and most fair in expressing their opinion that the people of American Samoa, as free people, should decide for themselves their political future. While the Commission makes no pretense that these recommendations represent the feelings of all the people of American Samoa, the Commission believes that it has fairly reflected the view of most American Samoans.

The great majority of American Samoans are devoted and devout in their feeling for America. However, facts may arise which would make independence or union with Western Samoa the wisest course of political development. The Commission feels that while these alternatives are not practical at this time, they should not be summarily dismissed. American Samoa must continue to search its soul in the light of future developments.

The Commission makes these recommendations with one goal in mind: to give American Samoa a framework of political institutions most suitable for both present conditions and likely changes in the near future.

2. THE COMMISSION RECOMMENDS THAT THE PEOPLE OF AMERICAN SAMOA ELECT THEIR OWN GOVERNOR.

The people of American Samoa must elect their own Governor. The question is not whether the people are "ready" to elect their own governor, but rather whether

they desire to elect their own Governor. If the people desire to elect a man Governor, that is sufficient justification for his holding the post. In most instances, the right man will be elected. To continue to impose a governor on the people of American Samoa is to perpetuate an unnecessary and outdated policy, known in other areas of the world as "colonialism".

An elected governor will be a man who is a resident of the territory, rather than an outsider. A resident of the territory is familiar with its problems, and need not waste time or money trying to understand them. Time and time again, Samoans have witnessed their governors tackle the same problems without ever achieving a solution. Other times, a man is not even in the job long enough to become aware of Samoa's problems before he is replaced—usually for political considerations.

The stop and start nature of city traffic is a close approximation of American Samoa's development. One Governor is a mover, another may be famous for slowing down. There is no sustained forward progress—again because the new man lacks knowledge of what took place before he assumed office. A locally-elected Governor would have the great advantage of familiarity with Samoa and Samoan culture as a basis upon which to make decisions.

Who decides whether or not the Governor of American Samoa is performing well? Under the present system, he is responsible to one man only, and that man is 8,000 miles away. The Governor need only be concerned with that one man's desires. What about the 30,000 or more people that he is supposed to govern? They should be the judges of his performance because they are in the best position to judge him.

In the transition of American Samoa to a truly democratic society, a local person as Governor will be able to

ease the inevitable jolts and shocks. He is in a position to understand local customs and traditions and can provide his own people with the type of guidance that carries with it sympathy and understanding.

It has been argued that no Samoans are ready to be Governor—even if this were true (and we do not believe it is) the most important consideration is the desire of the people to elect their own Governor, not the number of college degrees their Governor might hold. It might be pointed out that not all Governors of American Samoa have been college educated, and that there is a large and growing pool of American Samoans who hold college degrees. It should also be remebered that a Samoan, Peter Tali Coleman, has already been Governor.

One of the arguments against local election of a Governor is that he will play favorites and place all his relatives in jobs. This is a natural tendency which will never be eliminated altogether. But there is better chance of controlling nepotism if the governor were elected locally, for the local people can perceive and respond to such actions at the next election. Under the present system there is no Constitutional or legal restriction on the Governor's power to appoint his own men to key positions.

There is also a school of thought that American Samoa must learn to crawl before she can walk. These people suggest that Samoa must follow the pattern established by other territories whereby a Governor is appointed from the local population rather than from the U. S. mainland, before the governor is elected locally. Why waste time crawling if you can walk already? If a local person is going to be Governor, it is far better to have him elected than to have him appointed.

Even if the idea of an elected governor is accepted immediately, the earliest it can possibly be put into effect

is 1974 or 1976. If the territory continues to change at the present rate, it will be a different place by then. Samoans will be increasingly well educated and politically sophisticated.

Finally, the objection that a territorial governor must be responsible to Congress, since Congress controls the purse-strings, is not valid. Would an elected governor do anything so irresponsible as to insure the end of federal support for his people? If Congress does not approve of an elected Governor's actions, it need only withdraw the support without which American Samoa would not be able to effectively function.

3. THE COMMISSION RECOMMENDS THAT BOTH HOUSES OF THE SAMOAN LEGISLATURE BE POPULARLY ELECTED. THE COMMISSION RECOMMENDS THAT THE LEGISLATURE BE A FULL-TIME BODY, WITH COMMENSURATE SALARIES AND STAFF.

If Samoa is going to elect its own Governor, it should also choose both houses of its Legislature by popular vote. This would necessitate amending the Constitution of American Samoa to provide for the election of Senators by all those voters eligible to vote for members of the House of Representatives.

Many of the objections which have been raised to an appointed Governor apply (with lesser force because of the sanction of Samoan custom) to the "appointment" of Senators by the County Councils. By democratically choosing both its Legislature and its Governor, American Samoa would be well on its way to complete self-government.

The development of American Samoa requires that the Legislature be a full-time body. The problems of Samoa are such that members of the Legislature should devote

their entire energy to their solution. Such devotion is not consistent with simultaneous employment of legislators by the Government of American Samoa. One can never serve two masters well, and legislators should not be allowed to also work for the Government of American Samoa.

If the Legislature is to attract the best talent the Territory has to offer, it must pay its members a competitive salary. A fairly compensated, full-time legislator is apt to be a better lawmaker than an underpaid, part-time legislator.

The Legislature must have additional staff. If it is to adequately cope with the many pressing needs of American Samoa, the Legislature must have more than one overworked attorney to serve as its legislative counsel.

The Commission feels that implementation of these suggested changes would result in a Legislature more satisfactory to both the people of American Samoa and to the United States Congress.

4. THE COMMISSION RECOMMENDS THAT THE LOCAL GOVERNOR BE GIVEN EXCLUSIVE VETO POWER OVER ALL LEGISLATION DEALING WITH LOCAL MATTERS. DECISIONS AFFECTING BOTH THE UNITED STATES AND AMERICAN SAMOA SHOULD BE REFERRED TO CONGRESS FOR FINAL DISPOSITION.

If the Governor of American Samoa is going to be popularly elected, he should have the exclusive right to veto bills proposed by the Legislature and having only local import. An elected Governor is responsible to the people who make up his constituency, and as their representative he should be the final arbiter of the fate of local legislation. (Of course, the Legislature would retain its right to override the Governor's veto). If the Governor is popularly

elected, rather than appointed from Washington, there is no reason to retain the right of the Legislature to appeal to higher authority in Washington.

Of course, American Samoa realizes that as an American Territory, Congress must resolve all questions relating to change in the citizenship or nationality of its people. Likewise, American Samoa realizes that Congress must have the final word on all other issues which are of vital import to both the United States and American Samoa.

5. THE COMMISSION RECOMMENDS THAT THE EDUCATIONAL SYSTEM OF AMERICAN SAMOA BE RE-EXAMINED. IF AMERICAN SAMOA IS TO BECOME SELF-GOVERNING, SAMOANS MUST RECEIVE SUFFICIENT TRAINING TO ENABLE THEM TO DO THE JOB WELL.

American Samoans cannot assume complete responsibility for their own affairs if they are not trained to cope with those responsibilities. Hence, the educational level of Samoans must be considered in the choice of Samoa's political status.

Thus far, there has been no master plan evolved to train Samoans in the specific skill areas necessary for the orderly running of their government. Under the present, haphazard system, there are no Samoans studying law at an accredited law school, although there is a great need for trained Samoan lawyers to assume responsibility for the legal needs of their people. Similarly, the Government of American Samoa has had to recruit many stateside accountants in recent years, thus spotlighting a serious gap in the G.A.S. scholarship program.

In order to insure the success of self-government, there must be an intensive effort made to prepare Samoans for higher education, so that they may return from college

equipped to cope with the problems of administering American Samoa. Similarly, there is a great need for trained clerical and secretarial help in American Samoa, and salvation can only come if the present school system is changed.

The Commission is aware of the fact that some years may pass before Samoans will be fully qualified to assume *all* of their own government's operations, but a start towards this goal must be made now by improving the educational system.

6. THE COMMISSION RECOMMENDS THAT CONGRESS BE REQUESTED TO GRANT THE PEOPLE OF AMERICAN SAMOA THE OPPORTUNITY AND RIGHT TO BE OFFICIALLY REPRESENTED IN WASHINGTON.

Next year, American Samoa will be sending its own representative to Washington. He will have no official status in Congress other than his role as an agent of his people, charged with the responsibility of making known their desires and interests. The Commission believes that granting this delegate official status will be a great help in making the problems of American Samoa known to Congress.

The Commission realizes that requesting an official delegate while wishing to remain an unincorporated territory is an unusual step, but it does not see any inherent inconsistency in these requests. American Samoa is unique among United States possessions in that it has retained its traditional social structure after long years of American rule. Yet American Samoa is unqualifiedly "American". Thus, the Commission wishes to recommend not only that American Samoa retain its unincorporated status, to protect its traditional ways, but that it be allowed an official delegate in Congress, to present its modern needs.

American Samoa's expenditure of money and effort to send a non-official delegate to Washington illustrates the strong feeling in Samoa that such a representative is needed. Granting the delegate official status will both aid in his effectiveness and further cement the ties between the United States and its distant island possession.

7. THE COMMISSION RECOMMENDS THAT A PROGRAM BE INSTITUTED TO IDENTIFY, SURVEY AND REGISTER OWNERSHIP OF ALL THE LAND IN AMERICAN SAMOA.

Preservation of Samoa's land tenure system figured importantly in the Commission's deliberations and decisions. Land is the scarcest and most valuable item in Samoa. There are only 76 square miles of land in all of American Samoa, and most of this is so mountainous that it is useless for agriculture or residence. Ninety-eight (98%) percent of the land in American Samoa is presently held by families as communal property under the trust and care of a family matai. The Commission believes that protecting Samoan ownership of Samoan land is vital to the future political and economic well-being of American Samoa.

However, at present, land ownership in American Samoa is terribly confused. Families often find themselves in dispute over the boundary between communal lands, and different families have different methods of apportioning communal land among family members. The Commission recommends that a thorough survey be taken of all the land in Samoa, in order that boundaries may finally be firmly fixed, and land be registered in the name of the family which owns it. Such a survey will doubtlessly inflame a number of latent disputes, but the Commission feels that facing up to this problem now and solving it will do much to insure that Samoans retain control of their land.

8. FINALLY, THE COMMISSION RECOMMENDS THAT A JOINT COMMITTEE BE ESTABLISHED TO STUDY FURTHER THE POTENTIALITIES OF COMMONWEALTH AND ORGANIC ACT STATUS. THE COMMITTEE SHOULD BE COMPOSED OF REPRESENTATIVES FROM BOTH THE UNITED STATES CONGRESS AND THE AMERICAN SAMOAN LEGISLATURE. THE COSTS OF THE COMMITTEE SHOULD BE SHARED EQUALLY BY THE U. S. CONGRESS AND THE SAMOAN LEGISLATURE.

The Commission believes that intensive study needs to be made before the United States Congress and the people of American Samoa can finally accept or reject Commonwealth or Organic Act status for American Samoa. The Commission suggests that the Committee consider the following questions, among others, in its study.

I. Economic Problems
   A. Tariffs and Commercial Policy
      1. Advantages and disadvantages of the status quo.
      2. Effects of Commonwealth or Organic Act status upon tariffs and commercial policy.
      3. Effect of American Samoa's political status upon its ability to participate in regional economic groupings, such as a South Pacific common market.

   B. Transportation
      1. Costs and benefits of present air and water links between American Samoa and the United States.
      2. Effects upon American Samoa if the coastal

shipping laws were eliminated or modified vis a vis American Samoa.

C. Wage and Labor Standards
   1. Effects upon present wage and labor standards if Commonwealth or Organic Act status were adopted.

D. Money and Credit
   1. Effects of change of political status upon the use of money and credit policies to promote development of local capital.
   2. Access to foreign capital as a function of American Samoa's political status.

E. Federal Funding and Taxes
   1. Examination of alternative methods of federal funding under the present political status.
   2. Changes in the level of federal support if Organic Act or Commonwealth status were adopted.
   3. Federal tax policy.
      a. Effects of complete elimination of federal taxes in American Samoa.
      b. Effects of full imposition of federal taxes in American Samoa.
      c. Effects of American Samoa's assuming a responsibility to contribute a proportionate amount to the general expenses of the U. S. government.

F. Resources of American Samoa
   1. A thorough analysis of the natural and human resources of American Samoa.

2. Projected economic growth rates under the status quo, Commonwealth and Organic Act status.

II. Legal Problems

A. The present status of American Samoa.

1. Extent to which the U. S. Constitution presently applies in American Samoa.
2. Demarcation of the power of the Secretary of the Interior to alter the present form of government.

B. Future status of American Samoa.

1. Action necessary to achieve Commonwealth or Organic Act status.
2. Effects of Commonwealth or Organic Act status upon the present judicial and legal structure of American Samoa.

III. Cultural and Social Change

A. A thorough study of the present culture and social structure of American Samoa.

B. The probable effects on culture and social structure if the status quo is retained.

C. The probable effects of Commonwealth or Organic Act status upon the culture and social structure.

APPENDIX

The first American to land in Samoa was Lt. John Wilkes, who arrived in 1839. However, it was not until 1872 that the first agreement was reached between America and one of the High Chiefs of Samoa, and formal cession of the islands to America was not accomplished until 1904. Congress did not formally accept the Instrument of Cession until 1929.

At present, America Samoa is an unincorporated, insular possession of the United States, governed by an appointed Governor and an elected legislature, acting under authority granted them by the Secretary of the Interior, who in turn has been delegated his authority by the President, to whom Congress granted authority over Samoa in the Act of February 20, 1929.

The political history of Samoa under American rule is comparatively brief. For hundreds, if not thousands of years prior to American hegemony, Samoa's political history can be understood only in terms of the "matai" system.

Samoa has traditionally been ruled by "matais" or "chiefs". The basic political unit has always been the extended family, composed of related kin tracing their origins bilaterally back to mythological ancestors. Within the extended family, a collective family economy prevails. The matai is responsible for control of family lands and property and represents the family in political affairs.

Matais, including the most powerful ruling matais, are selected by democratic means. A matai, whether he is a "family" matai or a Paramount High Chief, is elected by those family or clan members over whom he exercises authority. When chiefs higher than "family" chiefs are chosen, the electors are themselves a select group, who have been selected by their families to cast their vote on behalf of the family. Thus, the election of a High Chief can be roughly analogized to the American Electoral College. The matai system, and the method of selecting matais, continue little-changed in present day Samoa.

Upon this basic social structure, has been built a framework of representative institutions, modeled after the American system. Even in the days of the Navy Administration, the Naval Governor would consult with the traditional leaders of Samoa before making a major decision.

However, the Samoan people became dissatisfied with their small voice in the government and in 1948 Congress approved the establishment of a bicameral legislature. At first the legislature's powers were severely limited, but after the Department of the Interior accepted responsibility for Samoa in 1951, it gradually was allowed to extend its authority.

In 1960, a major step towards self-government was taken when the first Samoan Constitution was approved. Today, the Revised Constitution of American Samoa provides for a popularly elected House of Representatives of 20 members and a Senate of 18 members, "chosen in accordance with Samoan Custom". The Legislature has complete authority to enact laws of local application, which do not conflict with the Samoan Constitution or federal laws applicable in American Samoa.

S. B. No. 59 Public Law 11-39

THE ELEVENTH LEGISLATURE OF AMERICAN SAMOA

First Special Session

Begun and held at Fagatogo, Tutuila, American Samoa on Tuesday, the first day of July one thousand, nine hundred and sixty-nine

AN ACT

TO ESTABLISH A FUTURE POLITICAL STATUS STUDY COMMISSION FOR AMERICAN SAMOA

PREAMBLE: The Legislature finds that there is an emergency need to begin work on a future political status report for the next regular session of the Legislature.

Be it enacted by the Legislature of American Samoa that Title II of the Code of American Samoa is hereby amended by the addition of a new Chapter 2.12 to read as follows:

CHAPTER 2.12

FUTURE POLITICAL STATUS STUDY COMMISSION

Sec. 2.1201—FUTURE POLITICAL STATUS STUDY COMMISSION: There is hereby established the Future Political Status Study Commission of American Samoa, referred to in this Chapter as "The Commission". The Commission shall consist of the President of the Senate and the Speaker of the House of Representatives, one Senator appointed by the President of the Senate, one Representative appointed by the Speaker of the House of Representatives, and three members of the community appointed by the Governor. The members of the Commission shall elect a Chairman by majority vote. The Commission shall exist only until the adjournment of the Second Regular Session of the Eleventh Legislature.

Sec. 2.1202—FUNCTIONS OF THE COMMISSION: The Commission shall study alternative forms of future political status open to American Samoa and shall assess the advantages and disadvantages of each. The Commission shall study and appraise the history, the development and the present status of political units comparable or relevant to Samoa, both within and outside the jurisdiction of the United States. The Commission shall present a complete report of its findings and recommendations to the Second Regular Session of the Eleventh Legislature.

Sec. 2.1203—POWERS OF THE COMMISSION: The Commission shall have power:

(a) To hold hearings, to compel the attendance and testimony of witnesses, to order the production of documents

and other tangible evidence, to administer oaths, and to cite for contempt;

(b) To employ necessary staff, including consultants, and experts, to purchase necessary materials, to make necessary publications, and to engage in necessary travel within American Samoa and abroad, and to take other necessary action for the performance of the functions assigned in Sec. 2.1202 of this Chapter.

AND BE IT FURTHER ENACTED, the sum of $20,000, or so much thereof as may be necessary, is hereby appropriated from unappropriated local revenue for the operation of the Future Political Status Commission of American Samoa. The funds hereby appropriated shall be expended only on the authority of the Chairman of the Commission.

AND BE IT FURTHER ENACTED that because of the emergency need to begin work on a future political status report for the next regular session of the Legislature, this Act shall take effect immediately upon being approved by the Governor.

(Signed)

SALANOA S.P.
AUMOEUALOGO
President of the Senate

(Approved) July 8, 1969

OWEN S. ASPINALL
Governor of American Samoa

(Signed)

FAINUULELEI S. UTU
Speaker, House of
Representatives

Appendix B

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71 - 527

United States v. Standard Oil Company Of California

On Appeal From The United States District Court For The Northern District Of California

No. 71 - 527. Decided January 24, 1972.

PER CURIAM.

The United States sought injunctive relief against appellee, alleging that appellee combined and conspired to restrain and monopolize the distribution and sale of petroleum products in American Samoa, in violation of Sec. 3 of the Sherman Act, 15 U.S.C. Sec. 3. (*1) The District Court for the Northern District of California dismissed the complaint for lack of jurisdiction on the ground that American Samoa is not a "Territory of the United States" within the meaning of Sec. 3. . . . . F. Supp. . . . . (1971). The United States has appealed pursuant to the Expediting Act, 15 U.S.C. Sec. 29. We note probable jurisdiction and reverse.

American Samoa is a group of seven small islands in the South Pacific. Treaties with Great Britain and Germany recognize the claims of the United States to the islands.

(*1) Section 3 provides in pertinent part:
"Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal."

1 Treaties 276, 31 Stat. 1878. By Act of Congress, 45 Stat. 1253, 48 U.S.C. Sec. 1661, powers to govern the islands are vested in the President, who has delegated the authority to the Secretary of the Interior, Exec. Order No. 10264, 16 Fed. Reg. 6417-6419.

The District Court distinguished between "organized" and other territories, holding that only the former are territories within Sec. 3 and that American Samoa is not "organized." (*2)

Section 3 extends to "any Territory of the United States." Congress, of course, did not have Samoa in mind when it enacted the Sherman Act. Yet, as this Court pointed out in holding that Puerto Rico is within the coverage of Sec. 3, "that is not enough. It is necessary to go further and to say that if the acquisition of that insular dependency had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act." Puerto Rico v. Shell Co., 302 U. S. 253, 257 (1937). There is no more reason to think that Congress would have done so for Samoa than for Puerto Rico. The Court stressed in Puerto Rico that Congress intended by Sec. 3 "to exert all the power it possessed in respect of the subject matter - trade and commerce," and the Court therefore found it

> "equally reasonable to conclude that Congress intended to include all territories to which its powers might extend. The same reason which requires the utmost liberality of construction in respect of the word 'trade,' also requires the same degree of liberality of construction in respect of the word 'territory'; and we hold, accordingly, that the word 'territory' was used in its

(*2) An "organized" territory is one in which a civil government has been established by an Organic Act of Congress.

most comprehensive sense, as embracing all organized territories, whether incorporated into the United States or not, including Puerto Rico." Id., at 259.

There is no question that Congress has power to apply the Sherman Act to Samoa. Because "Congress intended to include all territories to which its powers might extend," it follows that Samoa is a "Territory" within the meaning of Sec. 3. We are not persuaded by the District Court's distinction, for purposes of Sec. 3, between organized and unorganized territories. The Court held in Puerto Rico that " 'territory' was used in its most comprehensive sense"; the Court's further reference to "organized territories" was simply an application of that construction to the facts of the case, for Puerto Rico was an organized territory, as well as a response to the contention that Puerto Rico could not be included within Sec. 3 because it was not an "incorporated" territory. We discern no reason, and appellee suggests none, why Congress would have wished to exclude unorganized territories from the coverage of Sec. 3.

Reversed.

UNITED STATES *v.* STANDARD OIL CO. OF CALIFORNIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 71-527. Decided January 24, 1972

Section 3 of the Sherman Act applies to the unorganized Territory of American Samoa. Cf. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253. 330 F. Supp. 371, reversed.

PER CURIAM.

The United States sought injunctive relief against appellee, alleging that appellee combined and conspired to restrain and monopolize the distribution and sale of petroleum products in American Samoa, in violation of § 3 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 3.[1] The District Court for the Northern District of California dismissed the complaint for lack of jurisdiction on the ground that American Samoa is not a "Territory of the United States" within the meaning of § 3. 330 F. Supp. 371 (1971). The United States has appealed pursuant to the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. We note probable jurisdiction and reverse.

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many recognize the claims of the United States to the islands. 31 Stat. 1878, T. S. No. 314. By Act of Congress, 45 Stat. 1253, 48 U. S. C. § 1661, powers to govern the islands are vested in the President, who has delegated the authority to the Secretary of the Interior, Exec. Order No. 10264, 16 Fed. Reg. 6417.

The District Court distinguished between "organized" and other territories, holding that only the former are territories within § 3 and that American Samoa is not "organized."[2]

Section 3 extends to "any Territory of the United States." Congress, of course, did not have Samoa in mind when it enacted the Sherman Act. Yet, as this Court pointed out in holding that Puerto Rico is within the coverage of § 3, "that is not enough. It is necessary to go further and to say that if the acquisition of that insular dependency had been foreseen, Congress would have so varied its comprehensive language as to exclude it from the operation of the act." *Puerto Rico v. Shell Co.*, 302 U. S. 253, 257 (1937). There is no more reason to think that Congress would have done so for Samoa than for Puerto Rico. The Court stressed in *Puerto Rico* that Congress intended by § 3 "to exert all the power it possessed in respect of the subject matter—trade and commerce." and the Court therefore found it

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bracing all organized territories, whether incorporated into the United States or not, including Puerto Rico." *Id.*, at 259.

There is no question that Congress has power to apply the Sherman Act to Samoa. Because "Congress intended to include all territories to which its powers might extend," it follows that Samoa is a "Territory" within the meaning of § 3. We are not persuaded by the District Court's distinction, for purposes of § 3, between organized and unorganized territories. The Court held in *Puerto Rico* that " 'territory' was used in its most comprehensive sense"; the Court's further reference to "organized territories" was simply an application of that construction to the facts of the case, for Puerto Rico was an organized territory, as well as a response to the contention that Puerto Rico could not be included within § 3 because it was not an "incorporated" territory. We discern no reason, and appellee suggests none, why Congress would have wished to exclude unorganized territories from the coverage of § 3.

Reversed.